(821)

IN THE

Supreme Court of the United States

No. 495—October Term, 1960

COMMUNIST PARTY, U. S. A. and COMMUNIST PARTY OF NEW YORK STATE,
Petitioners,

v.

MARTIN P. CATHERWOOD, as Industrial Commissioner,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

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INDEX.

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Opinions Below

Based upon an official opinion of the Attorney General of the State of New York (Appendix B to Petitioners' Brief, pp. 45-49), the respondent's predecessor in office suspended the registrations of the Communist Party, U. S. A. (14-15)[1] and the Communist Party of New York State (17-18) as employers under the New York State Unemployment Insurance Law (N. Y. Labor Law, §§ 500 *et seq.*, [Consolidated Laws, Chap. 31, Art. 18]).[2]

This determination of the respondent's predecessor was sustained by the Unemployment Insurance Referee (3-14)

[1] References are to pages of the Transcript of Record.

[2] Suspension of registration as an employer results in the exclusion of the employer from the operation of the Unemployment Insurance Law so that it is thereby deprived of the opportunity of affording its employees the benefits of that law.

and the latter's decision was affirmed by the Unemployment Insurance Appeal Board (1-2).

The Appellate Division of the New York Supreme Court reversed the decision of the Appeal Board and overruled the suspension of the petitioners' registrations as contributing employers. Its opinion is reported in 8 A. D. 2d 918, 187 N. Y. S. 2d 200 (33-35).

The Court of Appeals of the State of New York reversed the decision of the Appellate Division and reinstated the suspension of the registrations. Its opinion (DESMOND, C. J.) is reported in 8 N. Y. 2d 77, 168 N. E. 2d 242. Judge FULD wrote a dissenting opinion; Judge VAN VOORHIS wrote an opinion concurring in part.[3]

Jurisdiction

The grounds on which the jurisdiction of the Court is invoked are set forth in Petitioners' Brief (pp. 1-2).

Questions Presented

The questions presented are as set forth in Petitioners' Brief (p. 2), except that the order amending the remittitur provided that the question of violation of the First Amendment was also involved.

Constitution, Statutes, Reports, etc., Involved

Involved in this case are:

U. S. Constitution:

Preamble; Art. I § 4; Art. 1 § 8 Cl. 1; Art. II § 1; Art. IV §§ 2, 4; Amendments I, V, X and XIV.

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[3] For all of the opinions, see Transcript of Record, pp. 36-45.

STATUTES:

Federal:

Communist Control Act of 1954 (50 U. S. Code §§ 841 *et seq.*, 68 Stat. 775);[4]

Subversive Activities Control Act of 1950 (50 U. S. Code § 781, 64 Stat. 987).[5]

State:

Feinberg Law (L. 1949, ch. 360, § 1);[6]

Labor Law §§ 511, 571.

Other Documents:

Congressional Record (August 16, 1954, p. 13837; August 17, 1954, pp. 14079, 14081, 14082, 14088);

Report of U. S. House of Representatives dated August 22, 1950 (House Rep. No. 2980, U. S. Code Cong. and Admin. News, 1950, p. 3886);[7]

New York Attorney General's Opinion (1957 Op. Atty. Gen. 239).[8]

Statement

The respondent's predecessor suspended the petitioners' registrations as employers under the New York Unemployment Insurance Law (14-15, 17-18). Upon the administrative review which ensued this determination was sustained under the provisions of the Communist Control Act of 1954 (5-6, 13-14). In establishing a *prima facie* case in the review proceeding, the respondent relied on the doctrines

[4] See Appendix A, *infra*, pp. 85-89.

[5] See Appendix A, *infra*, pp. 82-85.

[6] See Appendix A, *infra*, pp. 89-90.

[7] See Appendix A, *infra*, pp. 90-91.

[8] See Appendix B to Petitioners' Brief (pp. 45-49).

of judicial notice and judicial regard for legislative findings as to the character of the Communist Party as a criminal conspiracy for the overthrow of the Government by force and violence (3, 4-5, 38-39). The petitioners were free to submit such evidence as they saw fit to controvert this fact, but failed to avail themselves of the opportunity (23).

Summary of Argument

I. The Industrial Commissioner, possessed of the power to suspend the petitioners as employers under New York's Unemployment Insurance Law,[9] properly exercised that power.

A. Each of the petitioners constitutes a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States by force and violence.

Judicial Notice

None of the parties adduced any evidence whatever, either at the hearings before the Referee or at the hearing before the Appeal Board, as to the character or capacity of the petitioners. Having failed to submit any evidence, as was their right, to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such premise.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirma-

[9] In the performance of his statutory duty to determine the amount of contributions (*i.e.*, taxes) due from an employer (Labor Law § 571), the Industrial Commissioner has been held to have the power to determine who is an employer within the meaning of the statute (*Matter of Electrolux Corp.*, 286 N. Y. 390, 397, 36 N. E. 2d 633 [1941]).

tively to adduce evidence on that issue. He could rely completely upon the fact, that judicial notice would be taken at all stages of the proceeding of the fact that the petitioners constituted a criminal conspiracy. (*Barenblatt* v. *United States*, 360 U. S. 109, 127-129 [1959]; *Dennis* v. *United States*, 341 U. S. 494, 547 [1950]; *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, 424-433 [1950; concurring opinion of Mr. Justice JACKSON]; *Martinez* v. *Neelly*, 197 F. 2d 462, 465 [7th Cir., 1952], affd. 344 U. S. 916 [1953]; *Carlson* v. *Landon*, 187 F. 2d 991, 997 [9th Cir., 1951], affd. 342 U. S. 524 [1952]; *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 170 [Dist. of Col., 1948], affd. 334 U. S. 854 [1948]; *In re McKay*, 71 F. Supp. 397, 399 [N. D. Ind., 1947]; *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 372, 141 N. E. 2d 533 [1957], affd. 357 U. S. 468 [1958]; *Appeal of Albert*, 372 Pa. St. 13, 19-22, 92 A. 2d 663 [1952]; *Pawell* v. *Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 150-151, 22 A. 2d 43 [1941]).

The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime.[10] The Courts

[10] It is conceded that in denaturalization proceedings (*Nowak* v. *United States*, 356 U. S. 660 [1958]), disciplinary proceedings against a member of the Civil Service (*Adler* v. *Board of Education*, 342 U. S. 485 [1952]), proceedings to determine whether an individual possesses the requisite character to merit admission to the bar (*Schware* v. *Board of Bar Examiners*, 353 U. S. 232 [1957]), criminal proceedings against an individual (*Yates* v. *United States*, 354 U. S. 298 [1957]), or any other case in which it is sought to establish that an *individual* is guilty of criminal advocacy of overthrow of the government by force and violence, it is necessary that such fact must be affirmatively established by evidence other than that which may be considered under the doctrine of judicial notice. However, these cases are authority simply for the proposition that the doctrine of judicial notice of the character of the *Party* cannot be employed as a substitute for evidence in any case involving the requirement of proof that a *particular member* of the Party participated in any illegal activity as a member..

need no evidence to substantiate the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A., and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy, and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party, or otherwise, commits "communism".

Legislative Findings

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party. (See Subversive Activities Control Act of 1950, 50 U. S. Code §.781, 64 Stat. 987, Appendix A, *infra*, pp. 82-85; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 775, Appendix A, *infra* pp. 85-86; Feinberg Law, N. Y. L. 1949, ch. 360, § 1, Appendix A, *infra*, pp. 89-90; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980], U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix A, *infra*, pp. 90-91).[11]

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[11] See also: *Galvan* v. *Press*, 347 U. S. 522, 529 (1953); *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, 391 (1950); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block* v. *Hirsch*, 256 U. S. 135, 154 (1921); *Communist Party of U. S.* v. *Subversive Activities Control Board*, 223 F. 2d 531, 565-566 (App. D. C., 1954), revd. and remanded on another ground, 351 U. S. 115 (1956).

Inherent Illegality

It is apparent from the foregoing that in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrines of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners herein constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words, it is *malum in se*. They are constitutionally incapable of an innocent or legal act (*Sprott* v. *United States*, 20 Wall. 459, 464-465 [1874]).

B. Any rights, privileges and immunities which the petitioners may have had, including the right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

Termination of Rights, Privileges and Immunities

Both of the petitioners are proscribed under Section 3 of the Act (50 U. S. Code § 842, Appendix A, *infra*, p. 87) —the Communist Party of the United States by name, the Communist Party of New York State as one of the latter's "subsidiary organizations". Furthermore, Section 4(b) of the Act (50 U. S. Code § 843[b], Appendix A, *infra*, pp. 87-88), which is *in pari materia* with Section 3, defines the term "Communist Party" as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof,

and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

The petitioners distinguish between the phrase at the beginning of Section 3, "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix A, *infra*, p. 87) and the two phrases at the end of the section dealing with non-entitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof", and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof." The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State". Petitioners state that a subdivision is "a part of a thing made by subdividing" and that "the states, of course, were not 'made by subdividing' the nation, but themselves 'made' the United States" (Brief, page 19). In other words, as they argued in the Court below, the phrase "political subdivision", as used in the last clause of the section, is a short-hand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States (*Case* v. *Bowles*, 327 U. S. 92, 99 [1946]).

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having law-making powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign, law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign, law-making powers in the respects stated.

Moreover, the petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivision" refer to *local* governmental units within the States and Territories, while the same words, as used in the last clause, which actually terminates the rights of the Communist Party, include the States.[12]

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[12] This interpretation is, furthermore, in accord with the congressional intent, as the intent is reflected in the legislative record (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]; *id.*, at 13837 [daily ed. August 16, 1954]; *id.*, at 14082 [daily ed. August 17, 1954]). In the cited pages of the Congressional Record it was stated that the Act would deny the Party a place on the ballot. Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States* v. *Gradwell*, 243 U. S. 476 [1917]; 18 Am. Jur., tit. *Elections* § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3 of the Act.

According to the argument of the petitioners the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the petitioners now claim that since these territories have attained statehood the Act no longer applies to them? And if it is admitted that the Act continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the *laws*, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial which the petitioners seek to overthrow. The fine splitting of hairs, the reliance upon whether the Nation was "made" from the States or *vice versa*, cannot obscure the intent so clearly expressed in the statute.

Natural or Inherent Rights

Petitioners argue that the right of natural persons to employ others is a natural or inherent right and that such rights are not affected by the Communist Control Act (Sec. 3) which terminates only those rights "which have heretofore been *granted* * * * by reason of the laws of the United States or any political subdivision thereof." (Emphasis added.)

Literally, however, this provision applies to *all* "rights, privileges, and immunities" because the "laws of the United States or any political subdivision thereof" include the common law as well as statute law of the states and all "rights, privileges, and immunities" are "granted" by such laws since these terms describe the extent to which

particular individual or group claims or interests are secured by law.[13]

In any event, the right of the petitioners, generally, to enter into contracts, or specifically, to enter into contracts wherein they employ others, is not the right or privilege which is the subject of termination in the case at bar. Here there is involved, purely and simply, the right to be an employer within the meaning of New York's Unemployment Insurance Law. That right, obviously, is the subject of statutory grant.

Effect of Continued Existence

Petitioners argue that the provisions of the Internal Security Act and Section 5 of the Communist Control Act evince a legislative intent not to terminate "the right of petitioners to have and to function through employees" (Brief, pp. 20-22). However, this argument is predicated on the obviously meaningless and stultifying assumption that Congress would destroy the petitioners at one point and recognize their continued viability at another. The fallacy in the argument is exposed when it is seen that the statute destroyed the *legal* existence of the petitioners (if, indeed, they ever had such existence), but recognized that they probably would, nevertheless, continue on an illegal basis. Control by the Government is just as essential in the one case as in the other. In any

[13] See, for example, N. Y. Const., Art. I § 14, which provides: "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, * * * shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, * * * as are repugnant to this constitution, are hereby abrogated."

event, it is unsound to argue that because the regulatory provisions of the Internal Security Act will have no scope if the activities sought to be regulated are prohibited by the Communist Control Act, the proviso in Section 3 of the latter act should be interpreted to authorize the petitioners to continue to assert, as a legal entity, the rights, privileges and immunities which have been expressly terminated.

Obligations and Duties

The respondent argues, and he has been upheld by the Court below (37), that whatever rights, privileges and immunities the petitioners may have had, were terminated by the Communist Control Act. The dissenting opinion of FULD, J., in the Court below, held (43-44), and the petitioners here urge (Brief, pp. 14-16), that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act. Of course, in the very nature of the matter an *obligation or duty* to pay a tax cannot be considered a *right, privilege or immunity.* The relevant point involved herein is whether the *right to be a registered employer* was terminated by the Act. The correlative of the right to be an employer in covered employment is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent. (*Cf. Rutkin* v. *United States*, 343 U. S. 130, 137 [1951]; *Wainer* v. *United States*, 299 U. S. 92, 93 [1936]; *Angelus Building & Investment Co.* v. *Commission-*

er of Internal Revenue, 57 F. 2d 130, 132 [9th Cir., 1932], cert. den. 286 U. S. 562 [1931]; *State ex rel. Replogle* v. *Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 [1950]; *State* v. *Israel*, 124 Mont. 152, 220 P. 2d 1003, 1011 [1950]; *Commonwealth ex rel. Gilmer* v. *Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 [1951]; *Stein* v. *State Tax Comm.*, 266 Ky. 770, 115 S. W. 2d 443, 445 [1936]; *Eneke* v. *Metcalf*, 272 Ky. 770, 115 S. W. 2d 358 [1938]).

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. It follows that although the Act does not affirmatively relieve the petitioners of a tax liability, *it destroys a status upon which the tax liability depends.*

II. Congress had the constitutional power to enact the Communist Control Act.

The Communist Control Act is founded on a much broader, much firmer, and more relevant base than control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. Congress has the power to provide for the common defense (Const., Art. I, Sec. 8, Cl. 1; see also, the Preamble to the Constitution) and is under the duty to implement the guarantee to every State of a republican form of government. (*Dunne* v. *United States*, 138 F. 2d 137, 140 [8th Cir., 1943], cert. den. 320 U. S. 790 [1943]; *Farmer* v. *Rountree*, 149 F. Supp. 327, 329 [M. D. Tenn., 1956], affd. 252 F. 2d 490, 491 [6th Cir., 1958], cert. den. 357 U. S. 906 [1958]; *United States* v. *Peace Information Center*, 97 F. Supp. 255, 261 [Dist. of Col., 1951]; *Oil Workers International Union* v. *Elliott*, 73

F. Supp. 942, 944 [N. D. Texas, 1947]; *Teget* v. *Lambach*, 226 Iowa 1346, 1350, 286 N. W. 522 [1939]; *Commonwealth* v. *Nelson*, 377 Pa. St. 58, 69, 104 A. 2d 133 [1954], affd. 350 U. S. 497 [1956]).

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation, is considered political in nature, and is not judicially reviewable (*Ohio* v. *Akron Park District*, 281 U. S. 74, 79-80 [1930]; *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 [1937]; *Farmer* v. *Rountree*, *supra*).

The Tenth Amendment (reserved power of the States) does not impose any limitations on the powers of the Federal Government (*Case* v. *Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez* v. *Wiener*, 326 U. S. 340, 362 [1945]; *United States* v. *Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States* v. *Darby*, *supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case* v. *Bowles*, *supra*; *Bowles* v. *Willingham*, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States* v. *Darby*, *supra*, at pp. 114, 123-124; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

Federal Inaction

Federal inaction under the Act, on administrative or other levels, does not impugn the viability of the Act nor militate against its legal efficacy. The Communist Control Act is clear and unambiguous in its terms; it is not in

need of further Federal or State statutory implementation (*Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 [1954]; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 [1956]).

III. Although the petitioners, in any event, have no standing to assert any objections to the Act on constitutional grounds, it may nevertheless be clearly demonstrated that the Act is constitutional.

Bill of Attainder and *Ex Post Facto* Law

Since neither punishment nor retroactivity is involved, it does not constitute either a bill of attainder or an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States* v. *Lovett*, 328 U. S. 303, 315 [1946]; *Cummings* v. *Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids *penal* legislation which imposes or increases *criminal punishment* for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades* v. *Shaughnessy*, 342 U. S. 580 [1952]).[14]

The deprivations provided for in the Act do not constitute punishment since the legislation does not evince a penal intent. True it is that the statute imposes certain civil disabilities, but not all imposition of disability constitutes punishment. This Court recently held that whether a statute is a bill of attainder depends upon the purpose of

[14] The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws", was understood in a restricted sense relating to criminal cases only (*Bugajewitz* v. *Adams*, 228 U. S. 585 [1913]; see also, *Carpenter* v. *Pennsylvania*, 17 How. 463 [1855] and *Johannessen* v. *United States*, 225 U. S. 227 [1912]).

the statute (*Trop* v. *Dulles*, 356 U. S. 86, 96 [1958]. See also *Flemming* v. *Nestor*, 363 U. S. 603, 613-616 [1960] and *DeVeau* v. *Braisted*, 363 U. S. 144, 160 [1960]). It is quite clear from the "Findings and Declarations of Fact" which are expressly set forth in the Act (50 U. S. Code § 841, 68 Stat. 775), that the purpose of Congress in enacting this legislation was to draw the fangs of this "agency of a hostile foreign power" whose existence was "a clear and present danger to the security of the United States."

Furthermore, assuming, *arguendo*, that the disqualification was based on the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment (See *Garner* v. *Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson* v. *Millard*, 106 F. Supp. 635 [E. D. Mich., 1952], revd. on another ground and remanded 345 U. S. 242 [1952]; *Huntamer* v. *Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952]).

In the case at bar, too, a like result should ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party, the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

Due Process

Despite the proscription set forth in the Act, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking

place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to present evidence in opposition to the termination of their rights. Neither the Industrial Commissioner, nor the Referee, nor the Appeal Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner. They also had a full hearing.

It is submitted that there has been no violation of due process, either substantive[15] or procedural. It is further submitted, however, assuming it be held that the statute does permit a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. Mr. Chief Justice HUGHES, in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322 (1934), expressed the admonition that behind "the words of the constitutional provisions are postulates which limit and control."

The Courts, generally, have refused so to construe the Bill of Rights as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be, for without the observance of the

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[15] Petitioners assert (page 29 of their brief) that Section 3 is not "reasonably restricted to the evil with which it is said to deal" (citing *Butler* v. *Michigan*, 352 U. S. 380, 383 [1956]). But the evil at which the Act strikes is identical with the evil at which Congress struck in the Internal Security Act of 1950. We respectfully refer the Court to the treatment of this point in the respondent's brief in this Court in *Communist Party of the United States of America* v. *Subversive Activities Control Board*, October Term, 1960, No. 12, pp. 93-100.

primary duty of self-preservation the civil liberties of the individual would be meaningless, since they must, under such circumstances, succumb to the totalitarian regime which must inevitably follow.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument.* Preoccupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and an improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation where the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis* and *Yates* cases, *supra,* this Court affirmed "the basic premise of our political system—that change is to be brought about by non-violent constitutional process." No government can assure a "right" of violent overthrow; the guaranty and the right are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, since the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and withdraws it from the protection of the Bill of Rights.

First Amendment[16]

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment (*Communist Party of United States* v. *Subversive Activities Control Board*, 223 F. 2d 531, 544 [App. D. C., 1954], revd. and remanded on another ground 351 U. S. 115 [1956]).

This Court has consistently held that the freedoms guaranteed by the First Amendment are not without limitation (*Debs* v. *United States*, 249 U. S. 211 [1919]; *Frohwerk* v. *United States*, 249 U. S. 204 [1919]; *Schenck* v. *United States*, 249 U. S. 47, 52 [1919]; *Schaefer* v. *United States*, 251 U. S. 466 [1920]; *Dennis* v. *United States*, 341 U. S. 494, 508 [1950]). It has, in fact, specifically held that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government which are clearly necessary to the effectuation of proper Congressional power (*Schenck* v. *United States, supra; American Communications Association* v. *Douds*, 339 U. S. 382, 394, 402-404 [1950]; *Dennis* v. *United States, supra*, pp. 509-510; see also *Barenblatt* v. *United States*, 360 U. S. 109, 126 [1959]).

Tenth Amendment

The Tenth Amendment, too, has no bearing upon this exercise of Congressional power, because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to

[16] Although petitioners have not, in their brief herein, made a point of an alleged violation of the First Amendment, they did make the point in the Court of Appeals and they did obtain from the Court of Appeals an amendment of the remittitur to indicate that this point was presented to and necessarily passed upon by the Court of Appeals (48; see also 8 N. Y. 2d 1001, 169 N. E. 2d 427). Accordingly, we address a few remarks to this point.

every State of a republican form of government. (*Supra*, p. 14.)

IV. The action of the State, pursuant to the clear and unambiguous mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment.[17]

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact. As has been heretofore stated,[18] the Industrial Commissioner was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings in the Communist Control Act,[19] or both. However, it must

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[17] The petitioners have no right to claim a violation of the 14th Amendment, under which consideration is given to the privileges or immunities of "citizens of the United States" (*Slaughterhouse Cases*, 16 Wall. 36 [1873]). Numerous decisions have held that only natural persons are to be considered citizens under this provision (*Hague* v. *C. I. O.*, 307 U. S. 496, 514 [1939]; *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359 [1907]; see also, the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 144 [1951]).

[18] See *supra* pp. 4-6.

[19] Due process does not require that the Congressional findings in Section 2 of the Act as to the existence of a world or an American Communist movement and as to the character thereof be the subject of redetermination before the Referee or the Appeal Board. These are general *legislative* findings supporting the Act as a whole and may be used, subject to evidentiary rebuttal, as the basis for a *prima facie* case supporting administrative action. This Court has specifically recognized the validity of such legislative findings (*Galvan* v. *Press*, 347 U. S. 522, 529 [1953]; *Carlson* v. *Landon*, 342 U. S. 524 [1952]). Even in the dissenting opinion of Mr. Justice FRANKFURTER in the last cited case, at page 565, he stated "The immigration authorities were by the Act relieved of proving—*in order to make a prima facie case*— that the Communist Party is an 'organization * * * that believes in, advises, advocates or teaches * * * the overthrow by force or violence of the Government.'" (Emphasis added.)

be made clear that this was purely for the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the Commissioner's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities.

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott* v. *United States*, 20 Wall. 459, 464-465 [1874]).

ARGUMENT

POINT I

The Industrial Commissioner was legally justified in suspending the registrations of the petitioners as employers within the meaning of New York's Unemployment Insurance Law.

A. Commissioner's Power to Act.

The New York State Labor Law, § 571, empowers the Industrial Commissioner to determine the amount of contributions due from an employer, but neither this section of the law nor any other expressly authorizes the Commissioner to determine that a specific person is an employer within the meaning of § 571. Nevertheless, the question has been definitely answered in *Matter of Electrolux Corp.*, 286 N. Y. 390, 36 N. E. 2d 633 (1941), wherein it was said (p. 397):

> "[T]he statute here confers upon the Commissioner by necessary implication both power and duty to determine the persons who are employers and the persons who are employees within the meaning of the statute, * * * and the statute does not restrict the discretion of the Commissioner in respect to how or when a rule or order shall be made determining a controversy in that field."

Implicit, of course, in the power to determine who *is* an employer within the meaning of the statute is the power to determine who *is not* or who *cannot* be an employer under the statute.

B. The suspension was justified by reason of the fact that each of the petitioners constitutes a criminal conspiracy, the principal object of which is the overthrow of the Government of the United States and the Government of the State of New York by force and violence.

It must be reiterated at this point that none of the parties adduced any evidence whatsoever either at the hearings before the Referee or at the hearing before the Appeal Board as to the character of the petitioners. Not having submitted any evidence to controvert the fact that they were a criminal conspiracy, the petitioners are deemed to have waived any objections that they might otherwise have asserted to a determination based upon such fact.

The Commissioner, on the other hand, is in an entirely different position. It was not incumbent upon him affirmatively to adduce evidence of the fact. He could rely completely upon the fact that judicial notice would be taken at all stages of the proceeding of the fact that the petitioners constituted a criminal conspiracy. The time has long gone by since the Communist conspiracy has to be affirmatively proven as a fact in each case in which the question arises.

1. Judicial Notice.

Whatever the rule may have been prior thereto, it was considered and so in *In re McKay*, 71 F. Supp. 397 (N. D. Ind., 1947). In this case a petition for the naturalization of a Communist Party member was denied on the ground that he was a member of an organization that advocated the overthrow of the government. Although the Court based its decision partially on evidence, such as party pub-

lications which had been submitted at the hearing, it stated (p. 399):

> "Furthermore, it is my opinion that the Court may take judicial knowledge of the historical fact that Communism, based on the writings and teachings of Marx and Engels, advocates force and a so-called dictatorship of the proletariat as a necessary means of obtaining the objectives of Communism; and, also, that conformity to prevailing democratic processes by Communists in a particular country is for tactical purposes only inasmuch as a world-wide revolution is the ultimate objective, which objective is the common bond of the Communist parties in the various countries of the world."

One year later a case arose involving the constitutionality of the non-communist affidavit requirements of the Labor Relations Management Act of 1947 (61 Stat. 136, 29 U. S. Code §§ 141 *et seq.* [Supp. 1952]). The Court, in *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146 (Dist. of Col., 1948), affd. 334 U. S. 854 (1948), dismissed the complaint, holding that the statute was constitutional as based on the legislative finding that industrial unrest would be fomented and the country injured by political strikes instituted by the party in conformance with the party's nature and purposes. There was thus a basis for the statute in preventing a clear and present danger to the national economy. The Court said (p. 170):

> "Actualities are ignored when it is contended that a Communist may be without a purpose to create unrest and disturbances in a democracy. The Communist Party is known to be organized for the purpose of promoting throughout the world a program to spread communism. This program is its primary objective, to which all else must yield. The pattern followed, demonstrated by statements of its leaders, and even more convincingly by acts of its members, is to create economic unrest in a democracy; to encourage and promote strikes wherever possible, for by such

agitation, democracies will become unpopular and communism will take their place. *Evidence in a judicial proceeding is not needed to establish these as primary objectives.* The pages of history within late years establish them beyond the power of successful contradiction." (Emphasis added.)

In Pennsylvania (*Appeal of Albert*, 372 Pa. St. 13, 92 A. 2d 663 [1952]), it was held that a school board was justified in discharging a teacher for being a member of the Communist Party and for advocating or participating in un-American or subversive activities or doctrines in violation of the statute governing the public schools. The Court said (pp. 19-22):

"Her chief complaint, however, on this appeal, is that the Board not only took judicial notice of the fact that the Communist Party advocates the overthrow of the United States government by force and violence, but it refuses to allow her to present testimony to the contrary. This court has definitely decided that judicial notice may be taken of the fact that the Communist Party is a subversive organization which conspires to teach and to advocate the overthrow of the government of the United States by force and violence: [citing cases]. The doctrine of judicial notice is intended to avoid the necessity for the formal introduction of evidence in certain cases when there is no real need for it, where a fact is so well established as to be a matter of common knowledge. That the Communist Party advocates the use of violence to overturn the governments of non-Communist countries, and especially that of the United States, has been proclaimed in legislative statutes, and can fairly be said to be a matter of general notoriety. It would seem almost an absurdity of legal procedure to continue to submit to various juries in individual cases a question so readily and authoritatively determinable from the mere perusal of the writings of the acknowledged founders and protagonists of the Communist movement—Marx, Engels, Lenin, Stalin and others which teach the doctrine of proletarian revolution, the

> dictatorship of the proletariat, and the overthrow of the capitalist system and 'bourgeois democracy,' to be consummated by the forcible overthrow of the governmental organizations upon which alleged capitalist exploitation depends. Both general knowledge and accepted history stamp as indubitably true the statements contained in the opinion of Mr. Justice Jackson in *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, * * * [See pages 28-30, *infra*]. All the facts thus stated have long since become matters of such general notoriety that they are properly the subject of judicial notice."

As a matter of fact, Pennsylvania seems to have been the first jurisdiction to recognize the application of the rule as to judicial notice in this regard. As early as 1941 it was said in *Pawell* v. *Unemployment Compensation Board of Review*, 146 Pa. Super. 147, 22 A. 2d 43 (pp. 150-151):

> "What the policy of the Communist Party is, does not appear from the evidence. But courts have long recognized and have taken judicial notice that Communism, as a political movement, is dedicated to the overthrow of the government of the United States [and, with it, the governments of the States as necessary incidents in our system of divided sovereignty] *by force and violence.* * * *
>
> For ourselves, we are not willing to say that courts are such impotent instruments of government that they may not take judicial notice of facts so well known to the man on the street" (Italics by Court.)

The New York Court of Appeals, too, has recognized the Communist Party for what it really is. In *Matter of Daniman* v. *Board of Education of the City of New York*, 306 N. Y. 532, 119 N. E. 2d 373 (1954), it was said (p. 540):

> "In this court we are all agreed that the Communist party is a continuing conspiracy against our Government."[20]

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[20] Reversed on other grounds as to one petitioner, 350 U. S. 551 (1956).

As recently as 1957 the Court of Appeals reiterated its position in *Matter of Lerner* v. *Casey*, 2 N. Y. 2d 355, 372, 141 N. E. 2d 533 (1957) by defining the Communist Party as "a continuing conspiracy against our form of government". The *Lerner* case was affirmed by this Court in 357 U. S. 468 (1958).

And still more recently, in *Nostrand* v. *Balmer*, 53 Wash. 2d 460, 335 P. 2d 10 (1959), it was said (p. 22):

> "Even prior to the commencement of hostilities in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise. Since then, Congress, in 1950, enacted legislation designed to control the communist party, and, in 1954, proscribed it. The courts of New Jersey and Pennsylvania take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge."

The higher Federal Courts, too, have affirmed this principle and have expressly rejected the contrary rule which had formerly been recognized. Thus, in *Carlson* v. *Landon*, 187 F. 2d 991 (9th Cir., 1951), the Court said (p. 997):

> "It is said by the appellant that there is no proof here as to the intention of the Communist Party of the United States or of Communists to maim or destroy our government by force and violence, and cites the *Schneiderman* case (*Schneiderman* v. *United States*), 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796. *The Schneiderman case was of yesterday.* As Justice Hughes one time so expressively said, 'Courts do not function in a vacuum.' The Courts today are acquainted with current history and, too, with the legislative findings set out in the Internal Security Act of 1950, from which we quoted liberally in the first Carlson opinion.

> The existence as of today of a world-wide conspiracy against free democratic government by a major world power using as its vehicle the establishment of Communism by force and violence, is perfectly clear and incontrovertible." (Emphasis added.)

The *Carlson* case was affirmed by this Court (342 U. S. 524 [1952]). Even in the dissenting opinion Mr. Justice FRANKFURTER stated (p. 565):

> "The immigration authorities were by the Act relieved of proving—in order to make a *prima facie* case—that the Communist Party is an 'organization * * * that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government.' But in the circumstances of today a legislative definition of the Communist Party as an organization advocating violent overthrow of government made little difference in the required proof."

And in *Martinez* v. *Neelly*, 197 F. 2d 462 (7th Cir., 1952), affd. 344 U. S. 916, it was said (p. 465):

> "The time has passed when it can successfully be contended that proof is required that the Communist Party is or has been an organization which advocates 'the overthrow by force or violence of the Government of the United States.'"

In *American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382 (1950), Mr. Justice JACKSON, in a concurring opinion, said (pp. 424-433):

> "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political-party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. * * *
>
> 1. *The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free elec-*

torate. It seeks not merely a change of administration, or of Congress, or reform legislation within the constitutional framework. Its program is not merely to socialize property more rapidly and extensively than the other parties are doing. While the difference between other parties in these matters is largely as to pace, the Communist party's difference is one of direction.

The Communist program only begins with seizure of government, which then becomes a means to impose upon society an organization on principles fundamentally opposed to those pre-supposed by our Constitution. It purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship. It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and overturn our system of free, representative self-government.

• • • It matters little by whom the first blow would be struck; no one can doubt that an era of violence and oppression, confiscations and liquidations would be concurrent with a regime of Communism.

• • •

The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. It is a satrap party which to the threat of civil disorder, adds the threat of betrayal into alien hands.

• • •

3. *Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal.* It would be incredible naiveté to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power. • • • [C]onspiracy, violence,

intimidation and the *coup d'etat* are all that keep hope alive in the Communist breast.

* * *

5. *Every member of the Communist party is an agent to execute the Communist program.* * * *" (Italics by the Court.)

During the same year this Court rendered its opinion in *Dennis* v. *United States*, 341 U. S. 494 (1950), in which the Court said (p. 547):

"In finding that the defendants violated the statute, we may not treat as established fact that the Communist Party in this country is of significant size, well-organized, well-disciplined, conditioned to embark on unlawful activity when given the command. But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. *We may take judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country.* We may take account of evidence brought forward at this trial *and elsewhere*, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security." (Emphasis added.)

Lastly, on this point, and by way of summary, reference may be had to *Dworken* v. *Cleveland Board of Education*, 42 Ohio Op. 240, 94 N. E. 2d 18 (1950), aff'd 63 Ohio L. Abst. 10, 108 N. E. 2d 103 (1951), dism. 156 Ohio St. 346, 102 N. E. 2d 253 (1951), in which the Court said (p. 246):

"Courts now take judicial notice that whoever is a Communist is by reason of that fact a member of an organization the international purpose of which is to destroy the government of these United States. While our courts were slow to come to the view, and the

> higher the court the slower it came, our courts now nevertheless recognize and take judicial notice of this fact of which our people universally took recognition long before."[21]

In attempting to refute the argument with respect to judicial notice of the *character of the Communist Party* counsel argued in the Court below that *In re McKay* (cited *supra*, p. 23) is inconsistent with or has been overruled by *Nowak* v. *United States*, 356 U. S. 660 (1958). In this counsel is in error. In *In re McKay* judicial notice was taken among other things, of the fact that Communism advocates the forcible overthrow of the government. The *Nowak* case did not disagree with this concept; it merely held that in denaturalization proceedings proof merely of membership in the Communist Party was not sufficient to show that the *petitioner* therein was not attached to the

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[21] That the tiger has not changed its stripes is eloquently attested to by the statement issued by the conference of representatives of 81 Communist parties, held in Moscow in November, 1960. Excerpts therefrom, as provided in English by Tass, Soviet press agency, and reprinted in the New York Times, December 7, 1960, pp. 14-17, are set forth in Appendix B hereto, *infra*, pp. 92-95. The tenor of the manifesto was commented upon by the New York Times on the same day (p. 42) in an editorial entitled "*World Communist Program*". The Times said, in part: "After one has waded through the mass of verbiage, the central policy directive becomes plain. *It is a directive to Communists the world over to step up in every way possible the war against free men, using every possible weapon from armed revolution to diplomatic negotiations.* * * * One central fact emerges from this document. The communists of the world believe more firmly than ever that they represent the wave of the future. They support their belief by referring to a wide variety of factors ranging from our current domestic economic decline to the political setbacks we have suffered in some foreign countries. *This confidence, and the evidence presented to back it, should serve to remind us of the need for doing a better job in the future than in the past in keeping ourselves strong domestically and in effectively combatting Communist subversion and infiltration against the free world on every front.*" (Emphasis added.)

principles of the Constitution because it did not prove by clear, unequivocal, and convincing evidence that *he*, personally, *knew* that the Party advocated the violent overthrow of the Government. As a matter of fact, the Court implicitly recognized the historical character of the party. *But that was not the test.* The test in the *Nowak* case was: Did the *petitioner* therein know that the Party advocated the violent overthrow of the Government? This was a subjective matter as to which this Court held there was insufficient evidence.

Comparison was also made by counsel, in ostensible refutation of the respondent's position, of *Appeal of Albert* (cited *supra*, p. 25), with *Adler* v. *Board of Education*, 342 U. S. 485 (1952). But *Adler* is in agreement with our position in the case at bar. We have said that the Commissioner could, in the first instance, rely on the doctrine of judicial notice in establishing a *prima facie* case; that it was not incumbent upon the Commissioner affirmatively to adduce evidence of facts which could be judicially noticed. Having thus established a *prima facie* case, it was then the burden of the petitioners to submit, if they could, evidence to controvert such facts. In the *Adler* case this Court said (pp. 494-496):

> "Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full

opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard: 'The statute also makes it clear that * * * proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." * * * In that view there here arises no question of procedural due process.' 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, at 814-815.

Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

The *Adler* case describes the situation in the case at bar. Here the Industrial Commissioner relies on the doctrine of judicial notice to establish a *prima facie* case. The petitioners were thereupon free to rebut such facts. They were offered the opportunity to do so, but refrained. The rebuttable presumption has, at least for the purpose of this case, now become conclusive. The character of the Communist Parties, as a factual matter herein, stands established as a criminal conspiracy for the forcible overthrow of the Government.

Counsel for the Communist Parties also cited *Schware* v. *Board of Bar Examiners,* 353 U. S. 232 (1957), in attempted refutation of the judicial notice argument. This case simply held that the doctrine of judicial notice of the character of the Party cannot be employed as a substitute for evidence in any case involving the requirement of proof that a *particular member* of the Party participated in any illegal activity or did anything morally reprehensible

as a member. The petitioners have failed to distinguish between the crime itself and the perpetrator of the crime. The Courts need no evidence to substantiate or establish the fact that certain acts, by definition, constitute a crime. Thus, the Communist Party, U. S. A. and its subordinates and affiliates on other geographical levels, *in and of themselves* constitute a criminal conspiracy and no evidence of such fact needs to be adduced. They are a crime, just as burglary and arson, murder and treason are crimes. We are not dealing here with any particular individual who, as a member of the Party or otherwise, commits "communism".

The cases upon which counsel for the Communist Parties relied, deal with the problem of proving the guilt of an *individual* with respect to such crime. Thus, counsel erroneously asserted that in this Court's decision in *Yates* v. *United States*, 354 U. S. 298 (1957), it was held that the government had been unable to prove, in a prolonged trial, the proposition as to which the respondent contends the Court is required to take judicial notice. But *Yates* involved the question of the guilt of *individuals*. In the case at bar the only factual justification required to sustain the action of the Appeal Board is that the Communist Party is or has been an organization which advocates the overthrow by force or violence of the Government of the United States. The cases which we have cited amply support the view that judicial notice may be taken of that fact. If there remains any doubt in that regard, the doubt was laid to rest in *Barenblatt* v. *United States*, 360 U. S. 109 (1959), in which this Court said (pp. 127-129):

> "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient

to say without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' *Dennis* v. *United States*, 341 U. S. 494, 509. Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress.

On these premises, this Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. See, *e.g.*, *Carlson* v. *Landon*, 342 U. S. 524; *Galvan* v. *Press*, 347 U. S. 522. On the same premises this Court has upheld under the Fourteenth Amendment state legislation requiring those occupying or seeking public office to disclaim knowing membership in any organization advocating overthrow of the Government by force and violence, which legislation none can avoid seeing was aimed at membership in the Communist Party. See *Gerende* v. *Board of Supervisors*, 341 U. S. 56; *Garner* v. *Board of Public Works*, 341 U. S. 716. See also *Beilan* v. *Board of Public Education*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Adler* v. *Board of Education*, 342 U. S. 485. Similarly, in other areas, this Court has recognized the close nexus between the Communist Party and violent overthrow of government. See *Dennis* v. *United States*, *supra*; *American Communications Ass'n, C. I. O.* v. *Douds*, [339 U. S. 382] *supra*. To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course

of our national policy since the close of World War II, affairs to which Judge LEARNED HAND gave vivid expression in his opinion in *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 213, and to the vast burdens which these conditions have entailed for the entire Nation."

2. Legislative Findings.

Closely akin to the establishment of the character and nature of the Communist Party under the doctrine of judicial notice is the fact that great weight must be accorded to the legislative findings of Congress and of the legislatures of New York and other states with respect to the character and nature of the Communist Party (See Subversive Activities Control Act of 1950, 50 U. S. Code § 781, 64 Stat. 987 Appendix A, *infra*, pp. 82-85; Communist Control Act of 1954, 50 U. S. Code § 841, 68 Stat. 775, Appendix A, *infra*, pp. 85-86; Feinberg Law, L. 1949, ch. 360, § 1, Appendix A, *infra*, pp. 89-90; Report of U. S. House of Representatives dated August 22, 1950 [House Report No. 2980], U. S. Code Cong. and Admin. News 1950, p. 3886, Appendix A, *infra*, pp. 90-91).

Examination of the legislative history of the Communist Control Act establishes that the Act was the product of extensive legislative investigation. In the light of the evidence adduced upon the investigation, and in view of the fact that the legislative conclusions are in accord with the matters as to which judicial notice has been taken (See Subd. 1, *supra*), it must be held that the findings are reasonable and based upon a rational foundation. Under such circumstances the findings are entitled to great weight. *See e.g., American Communications Association, C. I. O.* v. *Douds*, 339 U. S. 382, 391 (1950); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Block* v. *Hirsh*, 256 U. S. 135 (1921). In the last cited case the Court said (p. 154):

> "But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled at least to great respect."

Legislative facts are general conclusions which support the policy of a particular law, and can be attacked only by showing that Congress acted arbitrarily or unreasonably or beyond its delegated powers (*Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 465-466 [1945]; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153 [1938]). Although courts may make inquiry to determine whether there is a reasonable basis for the legislative action (*United States* v. *Carolene Products Co.*, *supra*, 304 U. S., at p. 153; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209-210 [1934]; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547-548 [1924]), the inquiry is limited to the question of reasonableness.

Here, Congress recorded in Section 2 the basis for its action, the threat to the United States presented by the Communist movement. The existence of that threat and of that movement are recognized facts of modern history.[22] Congress cannot be accused of irrationality in taking account of them. (*Cf. Barenblatt* v. *United States*, 360 U. S. 109, 127-129 [1959]).

In short, the legislative findings in Section 2 are "[t]he reasons for the exercise of the power" by Congress (*Carlson* v. *Landon*, 342 U. S. 524, 535 [1952]). And as this Court said, with respect to similar findings,[23] in *Galvan* v. *Press*, 347 U. S. 522, 529 (1953):

> "On the basis of extensive investigation Congress made many findings including that in § 2(1) of the Act

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[22] See *infra*, pp. 70, 82-86.

[23] Section 2 of the Internal Security Act of 1950 (64 Stat. 987, 50 U. S. Code § 781 [*infra*, pp. 82-85]).

that the 'Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism and any other means deemed necessary, to establish a Communist totalitarian dictatorship,' and made present or former membership in the Communist Party, in and of itself, a ground for deportation. Certainly we cannot say that this classification by Congress is so baseless as to be violative of due process and therefore beyond the power of Congress."

And in *Communist Party of U. S.* v. *Subversive Activities Control Board*, 223 F. 2d 531 (App. D. C., 1954), rev'd and remanded on another ground 351 U. S. 115 (1956), the Court said (p. 565):

"In Section 2 of the Act, as we have pointed out, Congress made findings upon the existence and the nature of the world Communist movement. Some years ago, a difference of opinion existed as to the extent to which courts are bound by legislative findings of facts in cases in which constitutional questions are posed. Since then the Supreme Court has resolved the problem in *American Communications Ass'n* v. *Douds* and *Galvan* v. *Press*, both *supra*. The rule, as we understand it, is that, if it appears Congress has power over the subject matter of a statute, and if findings of fact are not baseless but are based upon extensive investigation, the courts are to adopt those findings."

The Court then quoted from the *Galvan* case, as set forth above, (p. 37) and concluded (p. 566):

"From that viewpoint, and without going further, there is, then, for our purposes in reviewing this order under this statute, a world Communist movement whose purpose it is, by treachery, sabotage, or any other necessary means, to establish a Communist proletarian dictatorship throughout the world."

By the same token, for the purposes of any case to which the Communist Control Act is applicable, such as the case at bar, the Communist Party, U. S. A. is "an instrumentality of a conspiracy to overthrow the Government of the United States," is dedicated "to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence," is an "agency of a hostile foreign power" which "renders its existence a clear, present and continuing danger to the security of the United States," and it should, therefore "be outlawed."

3. Inherent illegality.

It is apparent from the foregoing that, in the absence of evidence to controvert the fact, as is the situation in the case at bar, both the doctrine of judicial notice and the rule that legislative findings must be accorded great weight, establish the fact that the petitioners constitute a criminal conspiracy to overthrow the Government of the United States and the Government of the State by force and violence. As such, they are illegal organizations whose illegality permeates every facet of their operations. The illegality is based on the concept of being both constitutionally and morally wrong. In other words it is *malum in se*. They are constitutionally incapable of an innocent or legal act. Just as the Devil may quote Scripture, so may the Communist Party erect a facade of legal respectability, but it is simply a snare and a delusion. It does not have the capacity to enjoy any of the rights, privileges and immunities of a legal enterprise.

As Judge VAN VOORHIS said, in his partial concurrence in the Court below (44-45):

> "If the Communist Party in the United States is 'the agency of a hostile foreign power' and 'an instru-

> mentality of a conspiracy to overthrow the Government of the United States' as the Congress of the United States has determined (U. S. Code, tit. 50, § 841), on account of which it has been 'outlawed' and declared not to be 'entitled to any of the rights, privileges and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof' (*id.*, § 842), then it cannot be recognized as a legitimate employer or its servants as legitimate employees. It has no living legal tissue. It enjoys neither the identity nor the rights, privileges or immunities of a legal organization. Unless these findings by the Congress are idle words, it lacks the power to make contracts and cannot enter into the relationship of employer and employee. No agency of a foreign power or its subsidiary organizations can have a legal status as part of 'an authoritarian dictatorship within a republic,' as the Communist Control Act says, certainly where its reason for existence is that which is above stated. * * *"

This is not the case of a criminal who is also engaged in a legitimate enterprise in which he has hired employees. Nor is it a case involving a legitimate employer in a legitimate business indulging in some illegal practices in connection with his business. This is a case in which the "business" itself, the ends to be attained and the means used to attain those ends are wrong not only according to our laws but according to our moral and political standards. Thus, in *Sprott* v. *United States*, 20 Wall. 459 (1874), a case involving proprietary rights which arose out of a business transaction with the Confederate States, this Court affirmed a judgment which denied such rights. The Court said (pp. 464-5):

> "It [*i.e.*, the government of the Confederate States] had no existence, except as a conspiracy to overthrow lawful authority. Its foundation was treason against the existing Federal government. Its single purpose, so long as it lasted, was to make that treason success-

ful. So far from being necessary to the organization of civil government, or to its maintenance and support, it was inimical to social order, destructive to the best interests of society, and its primary object was to overthrow the government on which these so largely depended. Its existence and temporary power were an enormous evil, which the whole force of the government and the people of the United States was engaged for years in destroying.

* * * no validity can be given in the courts of this country to acts voluntarily performed in direct aid and support of its unlawful purpose."

The fact of the matter is that "There is no right to pursue an unlawful business" (*People* v. *Zinke*, 170 Misc. 332, 333, 10 N. Y. S. 2d 313 [Co. Ct., Kings Co., 1939]) and even where the illegality is merely *malum prohibitum* it has been held that no rights may arise therefrom. Thus, in *Matter of Clarke* v. *Town of Russia*, 283 N. Y. 272, 28 N. E. 2d 833 (1940), involving a Workmen's Compensation claim where the claimant had been a highway employee and a member of the Town Board, the Court denied benefits under the Workmen's Compensation Act. There was a statutory provision making it illegal for a member of the Town Board to be engaged as a highway employee. The Court said (p. 274):

"The decedent's contract of employment was not merely voidable, but void. A compensation award based upon an illegal contract which is void cannot be sustained (*Matter of Swihura* v. *Horowitz*, 242 N. Y. 523; *Herbold* v. *Neff*, 200 App. Div. 244.)"

In *Herbold* v. *Neff*, 200 App. Div. 244, 193 N. Y. S. 2d 244 (3rd Dept., 1922), involving a Workmen's Compensation claim, the Court said (p. 245):

"* * * the occupation of the deceased was that of a bartender in a saloon selling intoxicating liquors. The accident occurred in December, 1919. It is a fact familiar to all that at the time of the accident the sale

of intoxicating liquors was unlawful. The deceased and his employer were, therefore, engaged in an unlawful occupation. This court cannot lend its aid to the enforcement of any claim growing out of a contract of employment one of the purposes of which is the violation of a law of the land making the sale of intoxicating liquors a criminal offense. Therefore, the award cannot stand."

See, also: *Snyder* v. *Morgan*, 9 N. J. Misc. 293, 154 A. 525, 526 (Ct. of Common Pleas, Morris Co., 1931).

Since *any* contract of employment or otherwise to which the Communist Party is a party is necessarily void, it is apparent that the Communist Party does not possess the capacity to be an employer; it simply does not possess the right to employ individuals. Consequently it cannot properly be subjected to, or permitted to pay, the Unemployment Insurance Tax because the latter has been held to be an excise tax *on the right to employ individuals* (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 508-509 [1937]; *Charles C. Steward Mach. Co.* v. *Davis*, 301 U. S. 548, 579-580 [1937]; *Matter of Cassaretakis*, 289 N. Y. 119, 126, 43 N. E. 2d 391 [1942], aff'd 319 U. S. 306 [1943]).

The reverse side of the coin must also be observed. Since illegality of the hiring relationship results from the basic incapacity of the employer, employees can derive no benefits therefrom. It is true that under the Unemployment Insurance Law the employee's rights to benefits are not derivative in character where there is conceded coverage under the law, so that the failure in such a case of the employer to pay the unemployment insurance taxes does not affect the employee's right to benefits. Where, however, there is no coverage to begin with, the Party is not an "employer" and its employee is not an "employee" within the meaning of the law. Although absence of cover-

age is predicated upon illegality, the rights of the employer and the employee must be determined upon the basis of coverage. The Unemployment Insurance Law does not apply to all employments even though such employments are not tainted with illegality. Thus, among others, agricultural labor is not included as "employment" (N. Y. Labor Law § 511[6]). Obviously, in view of the established lack of coverage, it is immaterial, irrelevant and incompetent that the State passively permitted the Party to hire employees in the past. It is equally immaterial, irrelevant and incompetent that no criminal or conspiratorial act is shown as to the actual work for the Communist Party performed by an employee. And it is no more material, relevant or competent that employees of the Party have not been expressly deprived of unemployment insurance benefits than it is that farm workers are not so expressly deprived. The statute is addressed to the *employment*, not the *employee*. It seems clear that in the absence of coverage as to employment, there is no difference in result simply because a particular employee has not personally suffered outlawry or deprivation of civil rights.

C. Any rights, privileges and immunities which the petitioners may have had, including the right to be classified as an employer within the meaning of the Unemployment Insurance Law, were terminated by the Communist Control Act of 1954.

1. Termination of rights, privileges and immunities.

Both of the petitioners are proscribed under Section 3 of the Act (50 U. S. Code § 842, Appendix A, *infra*, p. 87). The Communist Party of the United States is proscribed

by name. The Communist Party of the State of New York is not mentioned by name. However, the title of the section is: "Proscription of Communist Party, its successors, *and subsidiary organizations.*" (Emphasis added.) Although the section begins by saying that the "Communist Party of the United States, or any successors of such party" is not entitled to rights, privileges, and immunities, the clause which actually terminates these rights, privileges and immunities is directed against "said party *or any subsidiary organization.*" (Emphasis added.) This language, standing by itself, is broad enough to include the Communist Parties of the various States and Territories. However, if there is any doubt about the matter, reference may be had to the definition of the term "Communist Party" which appears in section 4(b) (50 U. S. Code § 843[b], Appendix A, *infra*, pp. 87-88) of the Act (which is in *pari materia* with section 3). The term "Communist Party" is defined in section 4(b) as "the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof."

Preliminarily, it should be observed that the petitioners have effectively argued themselves out of Court. They state that they are unincoporated associations, that they are not artificial entities and have no existence independent of their members. "Obviously," as they said in the Court below, "they do not have the right to enter into contracts, including contracts of employment. In New York, it is not the organization but *its members* who have and may exercise rights. It is they, and not the organization, who have the right to enter into contracts which are en-

forcible by or against *them*." (Italics as in brief below.) The petitioners continued as follows: "The nature of the employment contracts involved in this proceeding must, of course, be determined by reference to New York law. It follows that they are not contracts of the National or the State Party, which are unknown to New York law."[24]

But the Industrial Commissioner has suspended the registrations under the Unemployment Insurance Law of the Communist Party, U. S. A. and the Communist Party of the State of New York. It is of these suspensions that they complain. However, they have succeeded in proving that they are as illusive in law as they are elusive in fact.

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[24] Because unincorporated associations such as the Communist Party (38) are not considered legal entities at common law, they do not have a common law right in their own names, to sue and be sued in civil suits in the state courts (WRIGHTINGTON, *Unincorporated Associations and Business Trusts*, pp. 425-436 [2d ed., 1923]; STARR, *Legal Status of American Political Parties*, 34 Am. Pol. Sci. Rev., pp. 439, 685, 693 [1940]; 7 C. J. S., *Associations*, § 36, pp. 88-89 [1937]), nor to hold or convey property (3 CASNER, *American Law of Property*, § 12.78 [1952]; 4 *id.* § 18.50; LLOYD, *Unincorporated Associations*, pp. 165-178 [1938]; PATTON, *Titles*, § 228 [1938]; 1 POWELL, *Real Property*, §§ 130-131 [1949]; 7 C. J. S., *Associations*, § 14 [1937]), nor to enter into contracts (*Hunt* v. *Adams*, 111 Fla. 164, 149 So. 24 [1933]; *I. W. Phillips & Co.* v. *Hall*, 99 Fla. 1206, 128 So. 635 [1930]; *Franklin Paper Co.* v. *Gorman*, 76 Pa. Super. 276 [1921]).

In addition to statutes giving a political party the right to appear on the ballot, many states now have laws giving unincorporated associations the capacity to sue or be sued in their own names or in the name of a designated officer (4 AM. JUR., *Associations and Clubs*, § 47 [1936]; *Moffat Tunnel League* v. *United States*, 289 U. S. 113 [1933]; *Brown* v. *Protestant Episcopal Church*, 8 F. 2d 149 [E. D. La., 1925]; *Donovan* v. *Danielson*, 244 Mass. 432, 138 N. E. 811 [1923]). Although many states have given certain unincorporated associations the right to take and hold property (1 POWELL, *Real Property*, pp. 490-491, nn. 39, 40 [1949]), very few of these statutes are broad enough to cover political parties. Moreover, it seems that no state has made general statutory grant to unincorporated associations of the right to enter into contracts in their own names.

Since they have no existence they are not in possession of any rights, privileges or immunities, for the deprivation of which they can make legal complaint. So be it. The determination of the Court below should be affirmed for this reason alone.

Even if the contracts, as the petitioners assert, are the contracts of the members of the organization collectively, they are not aided by that fact. Although section 3 of the Act applies, by its terms, only to organizations, it is apparent that if the deprivation against the organizations is to be effective, and if complete stultification is to be avoided, the statute must necessarily be applied to its members as well for the purpose of applying it to the organization. It has, in fact, been so held in *Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 (1954), in which the constitutionality of the Communist Control Act was upheld and its applicability to rights, privileges and immunities arising under State law was recognized. The Court acknowledged that the Act does not deal with an individual except insofar as the individual is identified with the Communist Party, and said (p. 217):

> "Indeed, the plaintiff argues in his brief and argues here orally through his counsel that the federal statute has to do with the Communist Party as such and not with the plaintiff nor with any person individually. With that proposition the court is in agreement. And as for the county clerk, he is dealing with the plaintiff in the manner that he does only in order that he may deal with the Communist Party as such. It is not the county clerk's fault. It is the plaintiff's fault who insists upon identifying himself with the party and becoming its embodiment, so to speak, in the choice of a campaign slogan as candidate for the office he seeks."

Certainly members of the Communist Party are so directly tied to the organization that they are as much bound

by the provisions of the Communist Control Act as was the plaintiff in the cited case.

In any event, whether the rights, privileges and immunities be considered those of a true artificial entity or those of the members who collectively constitute the proscribed organization, there is no doubt that the Act affects rights, privileges and immunities which arise under State law.

The petitioners distinguish between the phrase at the beginning of section 3, "the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein," (Appendix A, *infra*, p. 87), and the two phrases at the end of the section dealing with nonentitlement to any rights, privileges, and immunities of bodies created under the jurisdiction "of the laws of the United States or any political subdivision thereof," and termination of rights granted by reason "of the laws of the United States or any political subdivision thereof". The petitioners assert that the wording of the latter two clauses demonstrates Congressional recognition of the distinction between "a political subdivision" and a "State," and, therefore, conclude that the words "political subdivision," as used in the last clause, is a shorthand reference to the federal territories and possessions and the District of Columbia, all of which are "political subdivisions" of the United States.

In the first place it must be observed that even in the absence of other factors which would aid in the process of statutory interpretation, the mere absence of the word "State" in a federal statute does not exclude applicability of the statute to the States. Thus, in *Case* v. *Bowles*, 327 U. S. 92 (1946), the Court said (p. 99):

> "Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word 'state,' courts should not construe regulatory enactments as applicable to the States. This Court has previously rejected similar arguments, and we cannot accept such an argument now."

Secondly, it was quite clearly the intent of Congress to include in the last two phrases, in short-hand form, the same political entities as were included in detail in the first phrase. This is apparent from the context of the latter two phrases, in which the political entities referred to are entities having lawmaking powers. Certainly, the District of Columbia and many of the federal possessions do not have independent or sovereign law-making powers under which corporations may be formed and under which statutory rights, privileges and immunities may arise. Laws for the District and such possessions are enacted directly by Congress. A State, on the other hand, has independent, sovereign, law-making powers in the respect stated.

The petitioners' analysis, confining the meaning of "political subdivision" in the last clause to the District and federal possessions, is furthermore illogical because these, too, were specifically referred to in the first clause. The more logical conclusion would seem to be that in the first clause the words "political subdivisions" refer to *local* governmental units within the States and Territories, while the words "political subdivision" as used in the last clause, actually terminating the rights of the Communist Party, include the States.

This interpretation is furthermore in accord with the congressional intent, as the intent is reflected in the legislative record. Although Senator Butler said that section

3 strips the Communist Party of all its rights, privileges and immunities under the Constitution of the United States and all laws of the United States (100 Cong. Rec. 14079, 14081 [daily ed. August 17, 1954]), he and others also stated that it would deny the Party a place on the ballot (100 Cong. Rec. 13837 [daily ed. August 16, 1954]; *id.* at 14082 [daily ed. August 17, 1954]). Since the right to appear on the ballot, whether for State or Federal office, depends on State law (U. S. Const., Art. I, § 4 and Art. II, § 1; *United States* v. *Gradwell*, 243 U. S. 476 [1917]; 18 AM. JUR., tit. *Elections* § 9 [1938]), it must necessarily have been the intention of Congress that state-granted rights be included within the proscription of section 3.

Senator Ferguson stated that under the Act the Party "would not be able to make any lease or hire people under contract * * *" or "enter into any contractual relations" (100 Cong. Rec. 14088 [daily ed. August 17, 1954]). Clearly, construing section 3 to embrace rights under State laws is in harmony with the obvious desire of Congress to enact as broad a deprivation as possible.

Furthermore, according to the argument of counsel for the Parties, the Communist Control Act does apply to Alaska and Hawaii because at the time of its enactment they were territories of the United States. Do the respondents now claim that since these territories have attained statehood the law no longer applies to them? And if it is admitted that the law continues to apply to them, what happens to the principle that all States are admitted to the Union upon an equal footing?

It seems obvious, also, from the context of the section, as a whole, that the *laws*, the benefit of which the petitioners have lost, are necessarily the laws of the *governments*, federal, state and territorial, which the petitioners threaten to overthrow. The fine splitting of hairs, the

raising of the issue whether the Nation was "made" from the States or *vice versa*, cannot obscure the intent so clearly expressed in the Statute.

2. Natural or inherent rights.

Petitioners make the point (Brief, pp. 17-18) that Section 3 of the Act does not purport to terminate all of their rights, but only those "which have heretofore been granted * * * by reason of the laws of the United States or any political subdivision thereof." They then assert that natural persons possess an inherent right to employ others and conclude that *if* the petitioners were natural persons their rights would not be among the rights terminated by the section.

But the fact of the matter is that the petitioners' conclusion is based upon an erroneous premise; although not considered legal entities at common law, unincorporated associations have been statutorily invested with certain powers and capacities which stamp them as artificial entities. They have, in some instances, been given power to act in their own names; in others, they must still act *through* natural persons. However, even in the latter cases the natural persons do not act in their own right; they are merely the conduits for the effectuation of the purpose sought to be accomplished.[25]

Assuming, *arguendo*, that we were dealing with the "*inherent rights*" of natural persons, we must assume, since the petitioners have distinguished such rights from rights *granted* by the state (presumably, by statute), that such rights refer to those which were in existence under the common law. There is, of course, no national common law, operative as such, throughout the states of the Union. The adoption and application of the common law was a matter left to the several states for determination (*Hartley Pen*

[25] See footnote 24, *supra*, p. 45.

Co. v. *Lindy Pen Co.*, 16 F. R. D. 141, 149 [D. C. Cal., 1954]; *In re Farley's Estate*, 63 Cal. App. 2d 130, 146 P. 2d 249, 251 [1944]; *Heineman* v. *Hermann*, 385 Ill. 191, 52 N. E. 2d 263, 266 [1944]; *Floyd* v. *Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S. W. 2d 125, 129 [1943]; *Caparell* v. *Goodbody*, 132 N. J. Eq. 559, 29 A. 2d 563, 570 [1942]; *North Carolina Corporation Comm.* v. *Citizens' Bank & Trust Co.*, 193 N. C. 513, 137 S. E. 587, 589 [1927]). In New York the common law of England remains in force, except as modified by statute, by force of constitutional provision to such effect[26] (*People* v. *Morton*, 284 App. Div. 413, 414, 132 N. Y. S. 2d 302 [2d Dept., 1954], affd. 308 N. Y. 96, 123 N. E. 2d 790 [1954]).

In other words, by virtue of the constitutional provision the common law is included in that which is granted by the State. Literally, therefore, the provision of Section 3 which is quoted by the petitioners applies to *all* "rights, privileges and immunities" because the "laws of the United States or any political subdivision thereof" include the common law as well as the statute law of the states and all "rights, privileges and immunities" are "granted" by such laws since these terms describe the extent to which particular individual or group claims or interests are secured by law.

In any event, the use of the word "*granted*" in the clause which terminated the petitioners' rights, privileges and immunities is of no particular significance and may properly be equated with the clearly broader term "*attendant*" which appears in the prior clause in the same section—"The Communist Party of the United States, or any successors of such party • • • are not entitled to any of the rights, privileges, and immunities *attendant* upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof;

[26] See footnote 13, *supra*, p. 11.

• • •.'" Clearly, it must have been the intention of Congress to terminate those rights, privileges and immunities to which it felt the petitioners were not entitled.

It must further be observed that the petitioners have urged that the "right to employ others" is a natural or inherent right. We are not here concerned either with the "right to employ others" or the general right to enter into contracts. We are concerned with the right to be an employer within the meaning of New York's Unemployment Insurance Law.[27] That right, unquestionably, is the subject of a statutory grant.

3. Effect of continued existence.

The petitioners argue that the provisions of the Internal Security Act and Section 5 of the Communist Control Act evince a legislative intent not to terminate "the right of petitioners to have and to function through employees" (Brief, pp. 20-22) and in support thereof quote the Department of Justice in a brief submitted in *Communist Party* v. *Subversive Activities Control Board*.[28]

The argument is predicated, however, on the obviously meaningless, inconsistent and stultifying assumption that Congress would destroy the petitioners in one section and recognize their continued viability in another. The fallacy in petitioners' argument becomes apparent upon analysis of the statute. Congress has effectively destroyed the petitioners as *legal* entities. Nevertheless, Congress was aware that this might drive the movement underground and that it would continue on an illegal basis. This is

[27] It has previously been observed that the Unemployment Insurance Law of New York does not include all types of employment, even though unquestionably legal in character (agriculture, for example); *supra*, p. 43.

[28] No. 12—Oct. T., 1960. See footnote 26 in Petitioners' Brief (p. 21).

mere recognition of the character of the movement and of the recent history of its operations.[29] Certainly, if the movement continued, as it has in the past, on a clandestine basis after purportedly voluntarily going out of existence, how much more likely is it that it will do so after being put out of business by force of law?

In any event, control by the Government is just as essential in the one case as in the other. The regulatory provisions of the Internal Security Act apply as well to operations outside the law as those within the law.[30]

It is, moreover, unsound and illogical to argue that because the regulatory provisions of the Internal Security Act will have no scope if the activities sought to be regulated are prohibited by the Communist Control Act, the proviso in Section 3 of the latter act should be interpreted to authorize the petitioners to continue to assert, as a legal entity, the rights, privileges and immunities which have been expressly terminated.[31]

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[29] In the Respondent's Brief in this Court in *Communist Party* v. *Subversive Activities Control Board*, No. 12—October Term, 1960, pp. 16-17, it was said: "The post-World War II revelations of widespread espionage and infiltration of sensitive government agencies in Canada, England, and the United States by Soviet agents, recruited from the membership of the domestic Communist parties in those countries showed more clearly the nature and dimensions of the danger. In addition, the evidence adduced at the trial and conviction in 1949 of the eleven leaders of the American Communist Party under the Smith Act, and the commencement of hostilities in Korea in June, 1950, furnished Congress with further reason to believe, in September 1950, when the Act in issue was passed, that *the dissolution of the Communist International in 1943 had been a subterfuge and that there remained in existence a world Communist movement which endangered the security of the United States.*" (Emphasis added.)

[30] Illegal, as well as legal, operations are as much subject to regulation and control as they are subject to tax (*Wainer* v. *United States*, 299 U. S. 92, 93 [1936], *infra*, p. 55).

[31] *Cf.* the taxation of gains from illegal operations and the payment of license taxes upon businesses prohibited by law. See pp. 54-56, *infra*.

4. Obligations and duties.

The respondent argues, and he has been upheld by the Court below (37), that whatever rights, privileges and immunities the petitioners may have had, were terminated by the Communist Control Act. In the dissenting opinion in the Court below Judge FULD held (43-44), and the petitioners here urge (Brief, pp. 14-16), that the requirement to pay an unemployment insurance tax is a liability imposed upon them and not an "immunity or right" within the Act.

It seems clear that in the very nature of the matter an *obligation* or *duty* to pay a tax cannot be considered a *right, privilege* or *immunity.* But the relevant and crucial point involved herein is whether the *right to be a registered employer* was terminated by the Act.

The correlative of the right to be such an employer is the obligation to pay the tax, but the latter is merely the tail which should not be permitted to wag the dog. As well might it be argued that the obligation to pay an income tax is determinative of the right to earn income, or to push the analogy to an even greater extreme, the obligation to pay an estate tax is determinative of the right to pass title by will or descent.

Furthermore, it is settled law that the obligation to pay a tax is not dependent upon the legality of the transaction upon which the tax is based. Thus, in *Rutkin* v. *United States*, 343 U. S. 130 (1951), the Court said (p. 137):

> "There has been a widespread and settled administrative and judicial recognition of the taxability of unlawful gains of many kinds under § 22(a). *Johnson* v. *United States*, 318 U. S. 189 (money paid to a political leader as protection against police interference with gambling); *United States* v. *Sullivan*, 274 U. S. 259 (illicit traffic in liquor); *Humphreys* v. *Commis-*

sioner, 125 F. 2d 340 (protection payments to racketeer and ransom paid to kidnapper); *Chadick* v. *United States*, 77 F. 2d 961 (graft); *United States* v. *Commerford*, 64 F. 2d 28 (bribes); *Patterson* v. *Anderson*, 20 F. Supp. 799 (unlawful insurance policies); *Petit* v. *Commissioner*, 10 T. C. 1253 (black market gains); *Droge* v. *Commissioner*, 35 B. T. A. 829 (lotteries); *Rickard* v. *Commissioner*, 15 B. T. A. 316 (illegal prize fight pictures); *McKenna* v. *Commissioner*, 1 B. T. A. 326 (race track bookmaking)."

In *Angelus Building & Investment Co.* v. *Commissioner of Internal Revenue*, 57 F. 2d 130 (9th Cir., 1932), cert. den. 286 U. S. 562 (1931), it was said (p. 132):

> "[I]ncome derived from an unlawful business may be made to pay its toll in taxes in the same percentages as that which is reaped from legitimate enterprises."

Certainly, it would be specious reasoning to conclude from the foregoing that the collection of the tax constitutes tacit approval of the transactions from which the obligation to pay the tax arose. The obvious conclusion to be drawn from the dissenting opinion in the Court below is that since the Communist Party has not been expressly exempt from the payment of the tax, it is therefore, licensed to engage in transactions which have been forbidden by law. But this, too, has been settled adversely to the view of the dissenters below. Thus, in *Wainer* v. *United States*, 299 U. S. 92 (1936), the Court said (p. 93):

> "The difficulty of paying the excise upon the privilege of carrying on a business which is prohibited does not preclude the prescription of sanctions for non-payment. Petitioners insist it is a contradiction in terms to say the laws of the United States at the same time prohibit and license an occupation. The contention is based on misconception of the nature of the exaction. The United States has not licensed the liquor business but, as is clearly within its power, has laid an excise upon the doing of the business whether lawfully or unlawfully conducted."

And even more forthrightly it was said in *State ex rel. Replogle* v. *Joyland Club*, 124 Mont. 122, 220 P. 2d 988, 999 (1950):

> "The payment of a license or tax upon a business prohibited by statute is no justification for doing the forbidden act."

To the same effect, see *Commonwealth ex rel. Gilmer* v. *Smith*, 193 Va. 1, 68 S. E. 2d 132, 136 (1951); *Stein* v. *State Tax Comm.*, 266 Ky. 469, 99 S. W. 2d 443, 445 (1936); *Lueke* v. *Mescall*, 272 Ky. 770, 115 S. W. 2d 358 (1938).

As Judge VAN VOORHIS said in his partial concurrence in the Court below (45):

> "Taxation does not make it legal (*United States* v. *Yuginovitch*, 256 U. S. 450, 462; *United States* v. *Stafoff*, 260 U. S. 477, 480; *United States* v. *One Ford Coupe*, 272 U. S. 321, 326)."

It seems obvious that the essential test determining taxability is the prerequisite of coverage of the employer under the Unemployment Insurance Law; coverage cannot arise simply upon the basis of payment of the tax. Indulgence of the latter rule constitutes placing the cart before the horse.

POINT II

Congress had the constitutional power to enact the Communist Control Act.

The petitioners have asserted that Congress had no power to enact the Communist Control Act because they were dealing with rights granted by state law which do not substantially affect interstate commerce (Brief, pp. 19-20, 33). But the power of Congress to act is founded on a much broader and more relevant base than

the control of interstate commerce. The Federal Government, through Congress, has a constitutional right to act, not only in its own behalf, but also in behalf of the several States. This is made clear, not as a substantive grant of power, but as descriptive of the purposes of the Constitution, in the Preamble to the Federal Constitution, where it is said:

> "We, The People of the United States, in Order to * * * insure domestic Tranquility, * * * provide for the common defence, * * * do ordain and establish this Constitution for the United States of America."

The substantive constitutional grant of power is found in Art. I, Sec. 8, Cl. 1, which provides:

> "The Congress shall have Power To * * * provide for the common Defence * * * of the United States; * * *."

The substantive constitutional grant of power is further found in Art. IV, Sec. 4, which provides:

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; * * *."

With respect to Congressional action providing for the common defense, it was said in *United States* v. *Peace Information Center*, 97 F. Supp. 255 (Dist. of Col., 1951), at page 261:

> "The power of Congress to legislate concerning the national defense includes power to declare war, to raise and support armies, to provide and maintain a navy, as well as the power to make all laws necessary and proper for carrying into execution the foregoing powers. These powers necessarily include authority to take preventive measures against activities that may cause international misunderstandings, which, in turn, may lead to war, *as well as against endeavors to subvert, undermine, or overthrow the government.*" (Emphasis added.)

And in *Farmer* v. *Rountree*, 149 F. Supp. 327 (U. S. D. C., M. D. Tenn., 1956), aff'd 252 F. 2d 490 (6th Cir., 1958), cert. den. 357 U. S. 906 (1958), the Court said (p. 329):

> "Courts are constituted to adjudicate cases and controversies properly coming within the judicial sphere of action. They have no right or authority to resolve political or governmental questions, or to review issues of governmental policy entrusted to the executive and legislative departments.
>
> • • • It [*i.e.*, Congress] has, as it must necessarily have, the authority exclusive of any court, to determine the requirements of national defense, • • •
>
> The foreign policy of the United States is the exclusive province of the executive and the legislative branches of government, and in this area of responsibility, as well as in all questions of national defense, it is imperative that courts strictly observe the limitations upon their power and refrain from rendering any judgment which would embarrass the policy decisions of government or involve them in confusion and uncertainty."

Upon appeal to the Court of Appeals, the latter Court said (p. 491):

> "The claims set forth in the complaint, however, involved political and governmental questions which are confided by the Constitution to the legislative and executive branches of the government, and over which the courts have no jurisdiction.
>
> • • •
>
> All of these contentions were fully considered and determined in the opinion of Judge William E. MILLER, reported in D. C. 149 F. Supp. 327, with which we concur; and the judgment of the district court is, accordingly, affirmed for the reasons set forth in that opinion."

The broadest statement of the concept which underlies the exercise of legislative power in the respect here involved was set forth in *Teget* v. *Lambach*, 226 Iowa 1346,

286 N. W. 522, 123 A. L. R. 392 (1939). The Court said (p. 1350):

> "It has never been a part of the policy of this or any other state or sovereign to place limitations upon the power and means of maintaining its own existence."

Insofar as the power of Congress is based upon Art. IV, Sec. 4, reference may be had to *Oil Workers International Union* v. *Elliott*, 73 F. Supp. 942 (N. D. Texas, 1947), wherein it was said (p. 944):

> "The powers of Congress are outlined and defined by the Constitution of the United States. Section 4, Article 4, I believe it is, which provides that the National Government shall guarantee to each state a Republican form of Government. It is recognized that the Communistic form of government is not a representative form of government. Ours is a representative form of government, whereby the representatives of the people chosen by the people, determine the policies of the nation. In the Communistic form, you have more of the dictatorial type. It nowhere has functioned except by and in the hands of a dictator, therefore, it behooves the National Government to curb the growth of any system that would destroy representative government and bring about government by force."

In *Dunne* v. *United States*, 138 F. 2d 137 (8th Cir., 1943), cert. den. 320 U. S. 790 (1943), an anti-subversive federal statute was attacked upon the ground of lack of legislative power. The Court said (p. 140):

> "Appellants state that 'This statute must seek its validating force in the vague and undefined "right of self-preservation."' No such extremity exists. The statute is grounded upon specific Constitutional grants of power. The Preamble, setting forth the purposes of the Constitution, includes to 'insure domestic Tranquility' and to 'provide for the common defence,' as well as to 'secure the Blessings of Liberty.' Article I, § 8, cl. 1 specifically grants to Congress the power to

> 'provide for the common Defence.' Clauses 12 to 16 grant the specific powers 'to raise and support Armies,' 'to provide and maintain a Navy,' 'to make Rules for the Government and Regulation of the land and naval Forces,' and covering the Militia. Clause 18 grants the power 'To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers.' Article IV, § 4 is 'The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion,' and, upon application, 'against domestic Violence.' Thus, the Constitution expresses clearly the thoughts that the life of the Nation and of the States and the liberties and welfare of their citizens are to be preserved and that they are to have the protection of armed forces raised and maintained by the United States with Power in Congress to pass all necessary and proper laws to raise, maintain and govern such forces."

And, of course, if it has the right to inquire, it has the concomitant right to act, legislatively, upon the results of its inquiry. This was affirmed in *Commonwealth* v. *Nelson*, 377 Pa. St. 58, 104 A. 2d 133 (1954), aff'd 350 U. S. 497 (1956) as follows (p. 69):

> "[T]he duty of suppressing sedition within a State rests directly upon the Federal government by virtue of Article IV, § 4, of the Constitution which charges the National Government with the duty of guaranteeing 'to every State in this Union a Republican Form of Government.' "

Aside from the question of constitutional capacity to enact a law such as that involved herein, it should be noted that the right so to act is without constitutional limitation and is not judicially reviewable. Thus, in *Ohio* v. *Akron Park District*, 281 U. S. 74 (1930), this Court said (pp: 79-80):

> "As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political, not

judicial, in character and thus are for the consideration of the Congress and not the courts. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118; *O'Neill* v. *Leamer*, 239 U. S. 244, 248; *State of Ohio ex rel. Davis* v. *Hildebrant, Secretary of State of Ohio*, 241 U. S. 565; *Mountain Timber Co.* v. *State of Washington*, 243 U. S. 219, 234."

See, also *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 612 (1937).

From the foregoing it is obvious that Congress had the Constitutional power and duty to enact the Communist Control Act and that its right to act under the stated constitutional authorizations is not reviewable by the Court.

A. Federal Inaction.

Federal inaction under the Act, on administrative or other levels, does not impugn the viability of the Act nor militate against its legal efficacy. It requires no citation of authorities to support the proposition that where a statute is concededly vague and ambiguous in its terms resort may be had to the practical construction thereof as revealed by the action of those in whom the power of enforcement of the statute is reposed. But the Communist Control Act is clear and unambiguous in its terms; it is self-executing; it is not in need of further statutory implementation, either Federal or State (*Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 [1954]; *Pennsylvania* v. *Nelson*, 350 U. S. 497, 504 [1956][32]).

Although the argument is made that it is inconsistent to rely on the Federal policy of outlawing the Party and yet ignore the absence of Federal action denying the Party its status under the Federal Unemployment Insurance Law, it must be recognized that in the case at bar interpretation

[32] See quotation from the cited case at p. 63, *infra*.

and application of the Communist Control Act devolved upon the State in the absence of a clear expression of policy by Federal administrative authorities or interpretation of the Act by this Court. Failure of the Federal authorities to take action or otherwise test the meaning or validity of the Act need not be construed as a declaration of a Federal policy concerning the Party's status as an employer.[33] Moreover, the Federal policy seems to have been quite clearly and explicitly enunciated by Congress itself.

POINT III

The Communist Control Act is constitutional.

The Court of Appeals stated (38):

> "We accept none of the arguments that this Federal Communist Control Act is unconstitutional."

Judge FULD, in his dissenting opinion, avoided the issue of constitutionality, stating that there was no necessity for considering it (40). He disposed of the matter on a question of interpretation. The Appellate Division, too, although interpreting the Act adversely to the respondent, construed the Act upon an implicit assumption of constitutionality, saying (34):

> "No doubt the State of New York could take steps in this direction [*i.e.*, destroy the Parties' ability to perform certain functions of existence] as it might deem warranted."

Later it said (35):

> "We do not hold that the State may not prevent the Communist Party from engaging in any activity of existence."

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[33] The Court below said: "What the reason is for this position [*i.e.*, Federal inaction] we do not know and there is not enough in the record to prove any binding Federal administrative construction of the Federal act" (38).

In the only case thus far reported in which the question arose the Act was held constitutional. In *Salwen* v. *Rees*, 16 N. J. 216, 108 A. 2d 265 (1954), the Court affirmed for the reasons stated by Judge DREWEN in the Court below. Judge DREWEN had delivered an oral opinion, in which he said (p. 216):

> "The court fundamentally is asked to declare unconstitutional an act of Congress known as the Communist Control Act of 1954 [50 U. S. C. A. § 841 *et seq.*]. The court declines to do so."

While the highest Court of the State of New Jersey has *directly and categorically* held the Act to be constitutional, it should be noted that this Court implicitly held the Act to be constitutional in *Pennsylvania* v. *Nelson*, 350 U. S. 497 (1956). In that case the Court held that by the enactment of the Smith Act, the Internal Security Act of 1950 *and the Communist Control Act of 1954*, the Federal Government pre-empted the field of prosecutions for sedition. This Court said with respect to these federal statutes (p. 504):

> "Looking to all of them in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition. Taken as a whole, they evince a congressional plan which makes it reasonable to determine that no room has been left for the States to supplement it. Therefore, a state sedition statute is superseded regardless of whether it purports to supplement the federal law."

Of crucial importance to this case is the fact that the determination in the *Nelson* case was based on the Congressional plan which included the Communist Control Act. Implicit in the acceptance of this plan, as determinative of its conclusion, was the acceptance by the Court of the validity of all elements of the Congressional plan. The Communist Control Act stands approved by this Court.

A. Bill of Attainder and *Ex Post Facto* Law.

It is asserted by the petitioners that the Act results in the outlawry of the Communist Party and constitutes a bill of attainder and an *ex post facto* law.

A bill of attainder is generally described as a legislative act which imposes punishment upon a named individual or an easily ascertainable group without a judicial trial (*United States* v. *Lovett*, 328 U. S. 303, 315 [1946]; *Cummings* v. *Missouri*, 4 Wall. 277, 323 [1867]). The *ex post facto* provision of the Constitution forbids *penal* legislation which imposes or increases *criminal* punishment for conduct lawful previous to its enactment, but does not apply to legislation imposing civil disabilities (*Harisiades* v. *Shaughnessy*, 342 U. S. 580 [1952]).[34] The debates in the federal convention upon the Constitution show that the term "*ex post facto* laws" was understood in a restricted sense relating to criminal cases only (*Bugajewitz* v. *Adams*, 228 U. S. 585 [1913]; see also *Carpenter* v. *Pennsylvania*, 17 How. 463 [1855], and *Johannessen* v. *United States*, 225 U. S. 227 [1912]).

Although Section 3 of the Act does not provide for a judicial trial to determine the culpability of the organiza-

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[34] See *Trop* v. *Dulles*, 356 U. S. 86 (1958), in which the Chief Justice said (p. 96): "If the statute imposes a disability for the purpose of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature."

See also *Flemming* v. *Nestor*, 363 U. S. 603, 613-616 (1960), and the opinion of Mr. Justice FRANKFURTER in *DeVeau* v. *Braisted*, 363 U. S. 144, 160 (1960).

tions within its scope, it cannot be said that the deprivations provided for constitute "punishment". There cannot be said to be "punishment" because the legislation does not evince a penal intent. The view that "penal intent" must be shown is supported by the purpose and judicial development of the prohibition against bills of attainder. The constitutional injunction against this type of statute was designed to maintain the separation of the legislative and judicial functions and thereby preserve to the individual the traditional safeguards of a judicial trial. Those safeguards are denied when the legislature exceeds its proper function of defining crime and purports to judge those guilty of the crime.

The Courts have regarded certain classes of facts as establishing a legislative penal intent. One such situation was where the legislature candidly stated its purpose (See concurring opinion of Mr. Justice FRANKFURTER in *United States* v. *Lovett*, 328 U. S. 303, 318 [1946]). Courts have also found penal intent where the characteristic causing persons to be disqualified was irrelevant to the activity from which they were excluded (See *Cummings* v. *Missouri*, 4 Wall. 277, 319-320 [1867]; *Pierce* v. *Carskadon*, 16 Wall. 234 [1872]. *Cf. Dent* v. *West Virginia*, 129 U. S. 114, 128 [1889]). Even where relevancy existed courts have discovered penal intent when the legislature imposed a disqualification after consideration of evidence as to the character of the proscribed individuals (*United States* v. *Lovett*, 328 U. S. 303 [1946]; *cf. Ex parte Garland*, 4 Wall. 333 [1867]). However, in contrast to this latter type of case in which the legislature's action makes clear that it is judging individuals or groups and deciding that they are deserving of punishment, there is the situation, as in the case at bar, in which the legislature disqualifies a class

from certain rights or privileges without intending to penalize the individuals who may fall into that class. For example, in *Hawker* v. *New York*, 170 U. S. 189 (1898), where the Supreme Court upheld a statute prohibiting felons from practicing medicine, the legislature manifestly was not assessing the character of individuals and then imposing a penalty upon them; it was not at all concerned with the persons who were or might become members of that class. Rather it was enacting a statute on the basis of "general human experience" as to the characteristics of that class (*Hawker* v. *New York*, *supra*, pp. 195-196; see also, *Dent* v. *West Virginia*, *supra*).

Even though there is a legislative investigation into the character of individuals or groups and a disqualification on the basis of the legislature's implicit determination of culpability, recent cases require that the proscription have retroactive application in order to constitute punishment (See *Garner* v. *Board of Public Works*, 341 U. S. 716 [1951]; *American Communications Association, C.I.O.* v. *Douds*, 339 U. S. 382, 413-414 [1950]; *Albertson* v. *Millard*, 106 F. Supp. 635 [1952], revd. on another ground and remanded 345 U. S. 242 [1952]; *Huntamer v. Coe*, 40 Wash. 2d 767, 246 P. 2d 489 [1952]).

In *American Communications Association, C.I.O.* v. *Douds*, *supra*, this Court upheld section 9(h) of the NLRA, which restricted the opportunity of Communists to serve as union officials by denying unions the advantages of the NLRA if their officers refused to take a non-Communist oath. The Court emphasized that this section was prospective in character, since individuals could serve as union officials merely by renouncing membership in the Party. It, therefore, found that Congress was not imposing pun-

ishment for past conduct, but was merely preventing further disruption of interstate commerce.

In the case at bar, too, a like result must ensue. The Act does not inflict punishment of any character, and if it be held that punishment is inflicted, it is clear beyond any doubt that it is not imposed by reason of any past conduct. Recognizing the *continuing* criminal character of the Party,[35] the Act provides for inability to assert in the future any rights, privileges and immunities in connection with transactions which take place subsequent to the effective date of the Act.

Aside from the proposition that the Act does not constitute a bill of attainder, there is a serious question as to whether an *organization* can be the subject of a bill of attainder (See the concurring opinion of Mr. Justice BLACK in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 144 [1951]). In this connection it may be observed that there are two constitutional sources for the claimed privileges and immunities—the 14th Amendment and Article IV, § 2. Under the 14th Amendment, § 1:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *."

(The privileges and immunities involved in this provision are enumerated in the *Slaughterhouse Cases*, 16 Wall. 36 [1873].) Under Article IV, § 2:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[35] Actually, the Act did not *render* the petitioners illegal. They were already illegal. (See pp. 39-41, *supra*.) The Act merely recognized an existing fact and was, in effect, declaratory of such fact.

(The privileges and immunities involved in this provision are enumerated in *Corfield* v. *Coryell*, 6 Fed. Cas. 546, No. 3230 [C.C.E.D., Pa., 1823]; see also *Hague* v. *C.I.O.*, 307 U. S. 496, 511 [1939].)

Neither of these provisions, however, is applicable to the Communist Party. By their terms they apply to "citizens" of the United States and the States; numerous decisions have held that only natural persons are to be considered citizens under these provisions (*As to 14th Amendment—Hague* v. *C.I.O.*, 307 U. S. 496 [1939]; *Western Turf Ass'n* v. *Greenberg*, 204 U. S. 359 [1907]; *The Insurance Co.* v. *New Orleans*, 13 Fed. Cas. 67, No. 7052 [1870]. *As to Art. IV, § 2—Asbury Hospital* v. *Cass County*, 326 U. S. 207 [1945]; *Hemphill* v. *Orloff*, 277 U. S. 537 [1928]; *Paul* v. *Virginia*, 8 Wall. 168 [1868]).

B. Due process.

The petitioners assert that they have been deprived of a hearing and that the "facts" which are supposed to support the deprivation are found by legislative fiat. But, as has been heretofore stated, the Industrial Commissioner was under no burden to adduce evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice[36] or he could rely on the Congressional findings in the Communist Control Act,[37] or both. However, it must be made clear that the petitioners have not been deprived of an opportunity to be heard. Ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail them-

[36] *Supra*, pp. 23 *et seq.*

[37] *Supra*, pp. 36 *et seq.*

selves of the proffered opportunity. They must be deemed to have waived this objection.

Despite the proscription set forth in the Act, broad as it is, there is nothing in the Act which deprives the Party of substantive due process when action is brought against it to terminate a right which it claims. It is precisely that which is taking place in the case at bar. The petitioners were afforded the opportunity at the hearings herein to oppose the termination of their rights. Neither the Industrial Commissioner, nor the Referee or the Appeals Board denied them the right to present their case. And the statute, itself, does not deny them that right.

So far as procedural due process is concerned, they received notice of the action of the Commissioner and they received notice of all proceedings to review the action of the Commissioner.

It is submitted that there has been no violation of due process, either substantive or procedural. It is further submitted, however, even if it be held that there is a denial of due process, that such denial would be proper, as consonant with a basic postulate which underlies the due process provision—movements seeking to crush freedom need not be tolerated. (Mr. Chief Justice HUGHES, in *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 322 [1934], expressed the admonition that behind "the words of the constitutional provisions are postulates which limit and control").[38] Under our constitutional structure, even as orthodox a concept of democracy as that of "majority rule" must yield where a change would endanger the democratic character of the government. This basic postulate must necessarily

[38] See footnote 40, *infra*, pp. 72-73.

control due process. No one will maintain that the estabment of a totalitarian dictatorship in the United States by an amendment to the Constitution would not upset the basic scheme of things embodied in the Constitution as much as an amendment depriving certain states without their consent of their equal representation in the Senate (which Article V expressly prohibits). No democratic or constitutional principle is violated, therefore, when a democracy acts to exclude those groups from entering the struggle for political power which, if victorious, will not permit the struggle to continue in accordance with the democratic way.

During the period since World War II international Communism, while halted at some points, has made great gains and the increasing strength of the Soviet world places us in constant peril. *Internal* subversion has been the main weapon by which Communist victories have been won in many foreign countries. It now threatens the stability of still other countries. Recognizing the implications of this to our allies and Nato, the Federal Government is striving to meet the *external* threat. Recognizing also the ever-present *internal* threat, Congress, the Executive and the States have persistently, by legislation and security programs, attempted to combat Communism at home.

The Courts, generally, have refused to contrue the Bill of Rights so as to interfere with a reasonable legislative judgment of what laws are essential to national security. This is as it should be for without observance of the primary duty of self-preservation, the civil liberties of the individual would be meaningless for they must, under such circumstances, succumb to the totalitarian regime which

must inevitably follow.[39] If our government is to survive, it must defend itself, not only in preparation for external war for which men are still being drafted and sent to foreign lands, but we must prepare in advance against the dangerous preliminary attacks on our internal security, which are the peculiar technique of the Communist conspiracy and the prelude to war.

It is submitted that the Constitution should be construed in accordance with its purpose and *as one instrument*. Preoccupation with or emphasis upon one part of the Constitution and the ignoring of another equally important part, so as to endanger national survival, constitutes an unrealistic and improper method of applying constitutional standards and principles.

The greatest difficulty in recent years has been with respect to the situation wherein the right to assert infringement of civil liberties and the right of the government to resist violence seem to meet. There is required a deeper analysis of violence and non-violence and their relation to liberal democracy. In the *Dennis* and *Yates* cases, *supra*, this Court affirmed "the basic premise of our political system—that change is to be brought about by non-violent constitutional process." No government can assure a "right" of violent overthrow; the guaranty and the right

[39] "As for the legal system which the Communist Party, U. S. A. visualizes for post-revolutionary America, William Z. Foster has written: 'The civil and criminal codes would be simplified, the aim being to proceed directly and quickly to a correct decision * * *. The courts will be class-courts, definitely warring against the enemies of the toilers.' Such a legal system, in short, would naturally conduct trials as they have been conducted in the Soviet Union and the satellites, with no 'hypocrisy' about 'due process'; and all that we have cherished as the *Magna Carta* tradition would be destroyed as 'historically obsolete'." (OVERSTREET, *What We Must Know About Communism* [1st Ed.], page 228, quoting WM. Z. FOSTER, *Toward Soviet America* [1932], p. 273).

are mutually abhorrent. Certain political philosophers to the contrary notwithstanding, violent revolution exists *outside* rather than *inside* the law. Therefore, if the Communist Party is a conspiracy for the violent overthrow of the government, its advocacy of such violence colors its every act and it is not protected under the Bill of Rights.

C. First Amendment.

The basic postulate, discussed above with respect to due process, is a limiting factor also upon the operation of the First Amendment relating to the rights of free speech and assembly.[40] The point involved was well expressed in

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[40] In a discussion of the Communist Control Act in 23 Univ. of Chicago Law Review 173, 188-189 (1956; Carl A. Auerbach, *Communist Control Act of 1954*), supporting the thesis that we need not tolerate the intolerant, it is said:

"Mill's classic argument, the eloquent statement of Judge Learned Hand and Professor Stone's formulation [regarding the absolute character of the guaranty of free speech and press] must all assume, it seems to me, one 'impregnable' absolute—freedom itself. For if the theory that there are no political orthodoxies is taken to mean that we must also be skeptical about the value of freedom and therefore tolerate freedom's enemies, it will tend to produce, in practice, the very absolutism it was designed to avoid—as experience with modern totalitarianism demonstrates. When, therefore, Mill says that 'we can never be sure that the opinion we are endeavoring to stifle is a false opinion,' he could not consistently have been referring to the opinion that freedom of opinion itself should be suppressed. There is a passage in *On Liberty* which, I think, supports this inference and has significance for our contemporary problem. Asking whether the law should enforce an agreement under which an individual sells himself, voluntarily, as a slave, Mill says no and argues: 'The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. * * * But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification for allowing him to dispose of himself. * * * The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom.'

(Footnote continued on following page)

Communist Party of United States v. *Subversive Activities Control Board*, 223 F. 2d 531 (App. D. C., 1954), revd. and remanded on another ground 351 U. S. 115 (1956), in which it was said (p. 544):

> "The right to free expression ceases at the point where it leads to harm to the Government. The epigram which has become classic as a designation of that point is 'clear and present danger.' When danger to government is clear and present, the right of unrestricted speech gives way as do other basic rights of liberty and life. * * *
>
> The activities of a world Communist movement such as that described in this statute and of organizations in this country devoted to its objectives constitute a clear and present danger within the meaning of any definition of the point at which freedom of speech gives way to the requirements of government security."

This Court has, itself, consistently held that, although the language of the First Amendment seems to impose an absolute limitation upon Congressional power to sanction speech, press and peaceable assembly, these rights are not without limitation (*Debs.* v. *United States*, 249 U. S. 211 [1919]; *Frohwerk* v. *United States*, 249 U. S. 204 [1919];

(Footnote continued from preceding page)

So, in suppressing totalitarian movements a democratic society is not acting to protect the *status quo*, but the very same interests which freedom of speech itself seeks to secure—the possibility of peaceful progress under freedom. That suppression may sometimes have to be the means of securing and enlarging freedom is a paradox which is not unknown in other areas of the law of modern democratic states. The basic 'postulate', therefore, which should 'limit and control' the First Amendment is that it is part of the framework for a constitutional democracy and should, therefore, not be used to curb the power of Congress to exclude from the political struggle those groups which, if victorious, would crush democracy and impose totalitarianism. Whether in any particular case and at any particular time, Congress should suppress a totalitarian movement should be regarded as a matter of wisdom for its sole determination. But a democracy should claim the moral and constitutional right to suppress these movements whenever it deems it advisable to do so."

Schenck v. *United States*, 249 U. S. 47 [1919]; *Schaefer* v. *United States*, 251 U. S. 466 [1920]). It has, in fact, specifically held in *American Communications Assn., C. I. O.* v. *Douds*, 339 U. S. 382, 394 (1950), that the exercise of First Amendment freedoms may be restricted to protect other vital interests of the Government. See also *Barenblatt* v. *United States*, 360 U. S. 109 (1959), where this Court said (p. 126):

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."

The law is filled with examples of statutes which place restraints on freedom of speech or of the press, but which are nevertheless valid because the statute's objective lies within the power of Congress to accomplish, and the restraint is a necessary and appropriate concomitant of the exercise of the power. The Hatch Act validly forbids officers and employees in the executive branch of the Federal Government from taking an active part in political campaigns,[41] notwithstanding the obvious restraints imposed by the prohibition on such officers' and employees' freedom of speech and political expression (*United Public Workers* v. *Mitchell*, 330 U. S. 75, 94-104 [1947]). The Federal Regulation of Lobbying Act[42] validly requires all "those who for hire attempt to influence legislation or who collect or spend funds for that purpose" to spread on the record pertinent information as to "who is being hired, who is putting up the money, and how much," notwithstanding the incidental inhibitory effect of this require-

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[41] Act of August 2, 1939, c. 410, § 9; 53 Stat. 1148; 5 U. S. Code 118i.

[42] Act of August 2, 1946, c. 753, Title III, §§ 305, 307-308; 60 Stat. 840-842; 2 U. S. Code 246, 266-267.

ment on the exercise of First Amendment freedoms (*United States* v. *Harriss*, 347 U. S. 612, 625-626 [1954]). The Federal Corrupt Practices Act validly requires all political committees which accept contributions or make expenditures for the purpose of influencing national elections to keep exact accounts of all such contributions and to report publicly the names and addresses of all contributors as well as of persons to whom such expenditures are made,[43] though here, too, the requirement unquestionably imposes restraints upon freedom of political expression (*Burroughs* v. *United States*, 290 U. S. 534 [1934]).

The unfair-labor-practice provisions of the National Labor Relations Act[44] have led to certain valid restrictions on free speech (*National Labor Relations Board* v. *Virginia Elec. & Power Co.*, 314 U. S. 469 [1941]; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453 [1940]). Newspaper publishers are subject to regulation in the public interest, notwithstanding possible restrictive effects on their freedom to publish (*Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 130-133 [1937]; *Associated Press* v. *United States*, 326 U. S. 1, 19-20 [1945]; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178, 184 [1946]; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192-193 [1946]; *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155-156 [1951]). Radio Broadcasting stations engaging in certain practices can be denied licenses without unlawfully entrenching on First Amendment rights, despite the restraint on freedom of speech which may result from such denials (*National Broadcasting Co.* v. *United States*, 319 U. S. 190, 226-227 [1943]).

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[43] Act of Feb. 28, 1925, c. 368, Title III, §§ 302-305; 43 Stat. 1070-1072; 2 U. S. Code 241-244.

[44] Act of July 5, 1935, c. 372, § 9(h), as amd. by Labor Management Relations Act of June 23, 1947, c. 120, § 101; 61 Stat. 146.

Likewise, the Foreign Agents Registration Act[45] validly requires agents of foreign principals to register with the Attorney General and to submit detailed information relating to the agency relationship (*United States* v. *Peace Information Center*, 97 F. Supp. 225, 261-263 [D. D. C., 1951]; see also *Vierick* v. *United States*, 318 U. S. 236, 241 [1943], where the constitutionality of the Act was assumed). The National Labor Relations Act, as amended by the Labor Management Relations Act[46] validly denied the benefits of that Act to labor organizations unless each officer took an oath that he was not a member of the Communist Party (*American Communications Ass'n, C. I. O.* v. *Douds*, 339 U. S. 382, 389-412 [1950]). The postal laws[47] validly require the publishers of newspapers and magazines, as a condition of their use of second-class mail facilities, publicly to disclose the names of the owners of these publications and to mark with the word "advertisement" all contents the insertion of which has been paid for (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288 [1913]).

In all these and similar cases, the question was not whether some indirect, incidental restraint on complete freedom of speech or of the press might result from the enforcement of the law enacted by the legislature. That there would be some such restraint was apparent. The question was whether the objective of the legislature was one within its power to effect and, if so, whether the restraint was appropriate and reasonable under all the circumstances, including the end sought to be achieved by the law. As this Court described the problem in an anal-

[45] Act of June 8, 1938, c. 327; 52 Stat. 631-633; 22 U. S. Code 611 *et seq.*

[46] See footnote 44, *supra*.

[47] Act of August 24, 1912, c. 389, § 2; 37 Stat. 553; 39 U. S. Code 233, 234.

ogous context in *American Communications Ass'n, C. I. O.* v. *Douds, supra*, 339 U. S. at p. 400:

> "* * * In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task * * * to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.'"

D. Tenth Amendment.

The Tenth Amendment has no bearing upon the exercise of Congressional power in enacting the Communist Control Act because Congress acted well within its jurisdiction under the constitutional provisions for the "common defense" and the guaranty to every State of a republican form of government.[48]

The Tenth Amendment does not impose any limitations on the powers of the Federal Government (*Case* v. *Bowles*, 327 U. S. 92, 101-102 [1946]; *Fernandez* v. *Wiener*, 326 U. S. 340, 362 [1945]; *United States* v. *Darby*, 312 U. S. 100, 123-124 [1941]). It merely gives doctrinal body to an objection that Congress has no power to act at all in certain areas. It "states but a truism that all is retained which has not been surrendered" (*United States* v. *Darby*, *supra*). Thus, if Congress has power to act in a given area, no valid objection can be raised because of the fact that it thereby enters a field which ordinarily has been regulated by the States (*Case* v. *Bowles*, *supra*; *Bowles* v.

[48] See Point II, *supra*, pp. 56 *et seq.*

Willingham, 321 U. S. 503, 521-523 [1944, concurring opinion of Mr. Justice RUTLEDGE]; *United States* v. *Darby*, *supra*, at 114, 123-4; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156 [1919]).

POINT IV

The action of the State, pursuant to the mandate of the Communist Control Act, did not result in a violation of the Fourteenth Amendment.

The petitioners have asserted that the action of the respondent in refusing to accept unemployment insurance taxes from petitioners and in suspending them as contributing employers under the New York Unemployment Insurance Law denied them due process of law and the equal protection of the laws in violation of the Fourteenth Amendment (Brief, pp. 33-38).

Preliminarily, it needs to be observed that the law is well settled that the petitioners, as artificial entities, have no legal standing to voice such objection. The rule was reiterated by this Court in *Hague* v. *C. I. O.*, 307 U. S. 496 (1939) as follows (p. 514):

> "Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States.' (*Orient Insurance Co.* v. *Daggs*, 172 U. S. 557; *Holt* v. *Indiana Manufacturing Co.*, 176 U. S. 68; *Western Turf Ass'n.* v. *Greenberg*, 204 U. S. 359; *Selover Bates & Co.* v. *Walsh*, 226 U. S. 112).[49]

Insofar as the petitioners predicate a violation of the Fourteenth Amendment on an alleged lack of a hearing, they are faced with a record showing the contrary fact.

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[49] See also pp. 67-68, *supra*.

As has been heretofore stated,[50] the respondent was under no burden, in establishing a *prima facie* case, of adducing evidence respecting the nature and character of the Communist Party; he could rely on the doctrine of judicial notice, or he could rely on the Congressional findings, in the Communist Control Act,[51] or both. However, it must be made clear that this was purely for the purpose of establishing a *prima facie* case. The petitioners were free to submit any rebuttal evidence. The record clearly reveals that ample opportunity was afforded them to submit such evidence as they wished with respect to the nature and character of the Party but they failed to avail themselves of the proffered opportunity. They must be deemed to have waived this objection.

Insofar as the petitioners predicate a violation of due process on the lack of justification for the respondent's determination, conceding the criminal character of the petitioners, the respondent necessarily relies, in support thereof, on the provisions of the Communist Control Act which terminated their rights, privileges and immunities. The petitioners' criticism, based on the alleged fact that no State interest underlies the State action is without any rational foundation because it is based on a false premise. The respondent, responsible for the operation of New York's Unemployment Insurance Law, is under the obligation to determine coverage thereunder.[52] Like everyone else, he is subject to the operation and effect of all laws, Federal and State, which have an impact upon the execution of his duties. Among these was, of course, the Communist Control Act, which, without further implementa-

[50] See pp. 23 *et seq.*, *supra*.

[51] See footnote 19 on p. 20, *supra*.

[52] See p. 22, *supra*.

tion, statutory or otherwise, Federal or State,[53] forced his hand in the manner in which it has moved. As the Court below said (37):

> "In so doing, he could not ignore the Federal Communist Control Act * * *. We take that plain declaration and its absolute language to mean what it says, although we find no decisions construing it in this connection. It necessarily means that the artificial body or entity calling itself the Communist Party is to be deprived of all the 'rights, privileges and immunities' that other such entities have."

As to the alleged violation of the equal protection clause, a distinction must be drawn between an individual or an entity found guilty of a crime, but which is engaged in a legitimate business totally unrelated to the criminal acts, and an entity such as the Communist Party whose criminal character and activities so permeate its every fibre that it is not inherently or otherwise capable of engaging in any legal activities. Its criminal character and activities have a direct relationship to its inability to possess legal viability (*Sprott* v. *United States*, 20 Wall. 459, 464-465 [1874]).[54]

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[53] See p. 61, *supra*.

[54] See, also, pp. 39-41, *supra*.

CONCLUSION

The judgment below should be affirmed.

Dated: Albany, N. Y., April 14, 1961.

Respectfully submitted,

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Appendix A

Subversive Activities Control Act of 1950.

(50 U. S. Code § 781, *et seq.*, 64 Stat. 987, *et seq.*)

"§ 781. CONGRESSIONAL FINDING OF NECESSITY

As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and

in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objectives of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6) of this section, such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as 'Communist fronts', which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such 'Communist fronts'.

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above, already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attachés of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semidiplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States."

Communist Control Act of 1954.

(50 U. S. Code §§ 841, *et seq.*; 68 Stat. 775, *et seq.*)

"§ 841. FINDINGS AND DECLARATIONS OF FACT

The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality

of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchal chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

§ 842. PROSCRIPTION OF COMMUNIST PARTY, ITS SUCCESSORS, AND SUBSIDIARY ORGANIZATIONS

The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof, or the government of any political subdivision therein by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization by reason of the laws of the United States or any political subdivision thereof, are hereby terminated: *Provided, however,* That nothing in this section shall be construed as amending the Internal Security Act of 1950, as amended.

§ 843. APPLICATION OF INTERNAL SECURITY ACT OF 1950 TO MEMBERS OF COMMUNIST PARTY AND OTHER SUBVERSIVE ORGANIZATIONS; DEFINITION

(a) Whoever knowingly and willfully becomes or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes or objectives the establishment, control, conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a 'Communist-action' organization.

(b) For the purposes of this section, the term 'Communist Party' means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such

organization, whether or not any change is hereafter made in the name thereof.

§ 844. SAME; DETERMINATION BY JURY OF MEMBERSHIP, PARTICIPATION, OR KNOWLEDGE OF PURPOSE

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated."

Feinberg Law (L. 1949, ch. 360, § 1)

"The legislature hereby finds and declares that there is common report that members of subversive groups, and particularly of the communist party and certain of its affiliated organizations, have infiltrated into public employment in the public schools of the state. This has occurred and continues despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of

any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. * * * The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, such as the communist party and its affiliated organizations, from obtaining or retaining employment in the public schools, be rigorously enforced. * * *"

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950; U. S. Code Congressional and Administrative News 1950, p. 3886)

"Necessity For Legislation

The need for legislation to control Communist Activities in the United States cannot be questioned.

Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institution in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terriorism has been carried out in country after country and is an ever-growing threat to the

national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful existing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. * * *

Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

Appendix B

Excerpts from the statement issued by the conference of 81 Communist Parties, held in Moscow in November, 1960 (as provided in English by Tass, Soviet press agency, and reprinted in the New York Times, December 7, 1960, pp. 14-17).

"The chief result of these years is * * * the intensification of class struggles in the capitalist world, and the continued decline and decay of the world capitalist system; * * *.

Nevertheless, imperialism which is intent on maintaining its positions, sabotages disarmament, seeks to prolong the cold war and aggravate it to the utmost, and persists in preparing a new world war. This situation demands * * * the further consolidation of all revolutionary forces in the fight against imperialism, for national independence, and for socialism.

Our time * * * is a time of struggle between the two social systems, a time of socialistic revolutions and national liberalistic revolutions, * * * a time of transition of more peoples to the socialistic position, of the triumph of socialism and communism on a world wide scale.

* * *

* * * A reliable basis has been provided for further decisive victories for socialism. The complete triumph of socialism is inevitable.

* * *

The decay of capitalism is particularly marked in the United States of America, *the chief imperialist country of today.*

* * *

* * * *U. S. imperialism has become the biggest international exploiter.*

* * *

Appendix B

International developments in recent years have furnished many new proofs of the fact that United States imperialism is the chief bulwark of world reaction and an international gendarme, that *it has become an enemy of the peoples of the whole world.*

* * *

The Communist parties determine the prospects and tasks of revolution in keeping with the concrete historical and social conditions obtaining in their respective countries and with due regard for the international situation.

* * *

Communists regard the struggle for democracy as a component of the struggle for socialism. In this struggle they continuously strengthen their bonds with the masses, increase their political consciousness and help them understand the tasks of the socialist revolution and realize the necessity of accomplishing it.

This sets the Marxist-Leninist parties completely apart from the reformists, who consider reforms within the framework of the capitalist system as the ultimate goal and deny the necessity of socialist revolution. Marxists-Leninists are firmly convinced that the peoples in the capitalist countries will in the course of their daily struggle ultimately come to understand that socialism alone is a real way out for them.

* * *

The Marxist-Leninist parties head the struggle of the working class, the masses of working people, for the accomplishment of the socialist revolution and the establishment of the dictatorship of the proletariat on one form or another. The forms and course of development of the Socialist revolution will depend on the specific balance of the class forces in the country concerned, on the organization and maturity of

the working class and its vanguard, and on the extent of the resistance put up by the ruling classes.

• • •

Relying on the majority of the people and resolutely rebuffing the opportunist elements incapable of relinquishing the policy of compromise with the capitalists and landlords, the working class can defeat the reactionary, anti-popular forces, secure a firm majority in parliament, transform parliament from an instrument serving the class interests of the bourgeoisie into an instrument serving the working people, *launch an extra-parliamentary mass struggle,* smash the resistance of the reactionary forces and create the necessary conditions for peaceful realization of the socialist revolution.

• • •

In the event of the exploiting classes' resorting to violence against people, *the possibility of non-peaceful transition to socialism should be borne in mind.* Leninism teaches, and experience confirms, that the ruling classes never relinquish power voluntarily. In this case the degree of bitterness and the forms of the class struggle will depend not so much on the proletariat as on the resistance put up by the reactionary circles to the will of the overwhelming majority of the people, on these circles' using force at one or another stage of the struggle for socialism.

• • •

The interests of the struggle for the working-class cause demand ever closer unity of the ranks of each Communist party and of the great army of Communists of all countries; they demand of them unity of will and action. It is the supreme internationalist duty of every Marxist-Leninist party to work continuously for greater unity in the world communist movement.

• • •

Appendix B

All the Marxist-Leninist parties are independent and have equal rights, they shape their policies according to the specific conditions in their respective countries and in keeping with Marxist-Leninist principles, and support each other. The success of the working-class cause in any country is unthinkable without the internationalist solidarity of all Marxist-Leninist parties. *Every party is responsible to the working class, to the working people of its country, to the international working class and communist movement as a whole.*

• • •

The Communist and workers parties unanimously declare that the Communist party of the Soviet Union has been, and remains, the universally recognized vanguard of the world communist movement, being the most experienced and steeled contingent of the international communist movement.

• • •

• • • *Mutual assistance and support in relations between all the fraternal Marxist-Leninist parties embody the revolutionary principles of proletarian internationalism applied in practice.*" (Emphasis added.)